United States Court of Appeals

for the Second Circuit

APPENDIX

76-2079

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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HEYWARD MARTIN,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Respondent

----------x

B
P/s

DOCKET NO. 76-2079

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

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(on the brief)

UNITED STATES COURT OF APPEALS
FILED
SEP 30 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against -

HEYWARD MARTIN, also known as "Skeets" and WILLIAM BAKER,

Defendants.

- - - - - - - - - - - - - - - - - X

72CR 393

Cr. No.
(18 USC §2114, §1708 and §2)

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U.S. DISTRICT COURT E.D. N.Y.
★ [illegible] ★
TIME A.M.

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 23rd day of March 1972, within the Eastern District of New York, the defendant HEYWARD MARTIN, also known as "Skeets" and other persons to the grand jury unknown did rob approximately 8 registered letters, 600 blank United States Postal Money Orders, one Friden print-punch money order machine and one 38 Caliber Colt detective special revolver, from persons in control and custody of said United States Mail and said property of the United States at the Rochdale Village Postal Station, Jamaica, Queens, New York, and in effecting said robbery the defendant HEYWARD MARTIN, also known as "Skeets" placed the lives of the custodians of said United States Mail and said property of the United States in jeopardy by the use of a dangerous weapon, to wit: a shotgun. (Title 18 United States Code, §2114).

COUNT TWO

On or about the 23rd day of March 1972, within the Eastern District of New York, the defendant HEYWARD MARTIN, also known as "Skeets" and the defendant WILLIAM BAKER did unlawfully have in their possession eight registered letters addressed to the following addresses: Mr. Emile Mathieu, Avenue Bon Zon No. 15 (21-ETATE), Port-au-Prince, Haiti, W.I.; Admin. ABJ. Bureau,

A2

Quail Street Station, P.O. Box 6079, Albany, N.Y. 12206; Pension & Relief Section, 240 Centre Street, New York, N.Y. 10013; Town Hall, Town of Keene, Essex, County, N.Y.; Senor, Cristobal, Montalvo, Ciudadela Bolivariana, Manzana "H", Villa #8; Guayaquil Ecuador, S.A.; Cement Mason's Local 780, Vacation and Annuities Fund, 485 Fifth Avenue, New York, N.Y. 10017; Mr. John M. McDonald, 1008 Cale Street, Durham, North Carolina 27701; Mr. Otis Simmons, c/o Puri, 143-16 Farmers Blvd., Springfield Gardens, New York 11434, which were stolen from the Rochdale Village Postal Station Jamaica, Queens, New York, the defendants knowing the same to have been stolen. (Title 18 United States Code, §1708 and §2).

A TRUE BILL.

Samuel Chisholm
FOREMAN.

Robert A. Howe 1/7/76
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- :

HEYWARD MARTIN a/k/a "Skeets" and WILLIAM BAKER, : 72 CR 393

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

June 19, 1972
2:00 o'clock p.m.

B e f o r e:

HONORABLE MARK A. COSTANTINO, U.S.D.J.

ANTHONY MANCUSO
ACTING OFFICIAL COURT REPORTER

Appearances:

ROBERT A. MORSE, ESQ.
United States Attorney for the
Eastern District of New York

BY: PAUL LAZARUS, ESQ.
Assistant United States Attorney

JOHN C. CORBETT, ESQ.
Attorney for Defendant Martin

SIMON CHREIN, ESQ.
Legal Aid Society
Attorney for Defendant Baker

(Jury entered courtroom at 2:47.)

THE COURT: All right.

I must apologize, but I had a hearing on that just ended at this moment. It involved a lawyer that came from Texas and we couldn't very well put it over and we've completed that and now we'll go on with the criminal case.

MR. LAZARUS: The Government calls Special Agent John Shovlin.

J O H N S H O V L I N, called as a witness, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

THE CLERK: State your name, sir.

THE WITNESS: John Shovlin, S-H-O-V-L-I-N.

DIRECT EXAMINATION

BY MR. LAZARUS:

Q Mr. Shovlin, what is your occupation, please?

A Special Investigator with the United States Postal Service.

Q Do you know the defendant, William Baker?

A Do I know him?

Q Yes.

A Yes, I know him as a carrier for the post office.

Q Do you see him in this courtroom?

A Yes.

Q Would you point to him, please?

A He's the last man on the left, seated at the table.

MR. CHREIN: It's conceded that he has identified my client.

Q Did you have occasion to see William Baker on the 24th of March, 1972?

A Yes, I did.

Q Did you have occasion to speak to him in the presence of Inspector O'Neal of the Post Office Department?

A Yes.

Q Did you have occasion to be present when a conversation took place between the defendant Baker and Inspector O'Neal?

A On the morning of the 24th, sir.

Q Was there more than one conversation?

A On the morning of the 24th, Mr. Baker was arrested by Inspector O'Neal at the Post Office.

MR. CHREIN: I would object, unless he was present.

THE COURT: It's hearsay unless he was present.

THE WITNESS: I was present.

THE COURT: He was present, yes.

Q Were you present when a conversation took place

concerning when the defendant William Baker, first learned of the robbery of the Rochdale Post Office?

A Yes. He was being questioned at the Brooklyn Post office, across the street.

Q Who was present?

A Agent O'Neal, Mr. Baker and myself.

Q What was said with regard to the defendant, William Baker?

A Inspector O'Neal had asked him when he found out about the robbery of the Rochdale Post Office.

Q What was his reply?

A He said he had found out the night before, down in the projects in Brooklyn.

Q Did he indicate on what night before, he was referring to?

A What do you mean?

Q This conversation took place on what day?

A On the 24th, the day after the robbery, sir.

Q Did he indicate what time on the night of the 23rd -- that's what he was referring to?

A Right.

Q Did he indicate approximately what time it was?

A Sometime between eight thirty and nine thirty, because we hadn't established when he got to Brooklyn that night.

MR. LAZARUS: I have no further questions.

MR. CHREIN: I have a few.

CROSS EXAMINATION

BY MR. CHREIN:

Q Mr. Shovlin, the conversation you're testifying to concerns you, happened on March 24th; is that correct?

A Yes, sir.

Q That would be about three months ago, give or take a few days?

A Just almost three months ago.

Q Now, was anybody taking notes during the course of that conversation, or are you testifying entirely from memory?

A From memory, sir.

Q And how many cases have you been involved in, in which letter carriers or other people were involved in connection with thefts from the mail or robberies of post offices since March 24?

A I haven't -- actually, I do the investigating. The Inspectors handle the arrests and everything from there on.

Q Have you been present during any conversations between postal inspectors and defendants since March 24?

A Yes, I have, sir.

Q About how many conversations were you present at

at involving postal inspectors and suspects?

A I would say four or five, sir.

Q And did you participate in these conversations, or do the inspectors participate?

A Mostly the inspectors do it themselves.

I lay the groundwork, and they take it from there.

Q Can you tell me, during these conversations, if notes are taken by anybody?

A Usually they are, but when you're interrogating someone, you try not to distract them by taking notes, sir.

Q So then, if notes were taken, you did not take notes?

A No, I didn't, sir.

Q Would I be fair in saying that the entire conversation concerning which you are testifying to today was carried on between my client, Mr. Baker, and Agent O'Neal, sitting at this table?

A Agent O'Neal and myself; I partly knew Baker from being in the post office, sir.

Q The questions and answers concerning when Mr. Baker first found out about the robbery, were these conversations between Agent O'Neal and Mr. Baker, or did you participate in that part of the conversation?

A I didn't specifically take part in that, because there

was some discrepancy between what Baker said and what --

Q I'm just asking you if you took part in that conversation as to when my client first discovered about the robbery?

A If you're asking if I was trying to specify it, no.

Q The question and answer you have testified to was a question by Agent O'Neal and my client, who is sitting over there at the other table?

A Yes.

MR. CHREIN: I have no further questions.

REDIRECT EXAMINATION

BY MR. LAZARUS:

Q You were present throughout that conversation?

A I was.

THE COURT: All right.

Step down.

MR. LAZARUS: The Government rests, your Honor.

MR. CHREIN: Defendant Baker rests.

MR. CORBETT: Defendant Martin rests.

THE COURT: All right. We'll just take you out for one minute and then we'll bring you in again.

(Jury left courtroom at 2:55 P.M.)

THE COURT: All right.

MR. CORBETT: On behalf of the defendant Martin, I renew, again, my motion to dismiss on the ground that

the Government has failed to make out a prima facie case as to counts 1 and 2 of the indictment.

I further move for a directed verdict of acquittal on counts 1 and 2 of the indictment on the ground that the Government has failed to introduce sufficient evidence to prove the defendant guilty beyond a reasonable doubt.

Now, Count 2 of the indictment interests me particularly, Judge, because of the fact that I feel that the mail has never been shown to be in the possession of this defendant.

MR. CHREIN: Your Honor, my motion is to dismiss Count 2 as against the defendant Baker -- or rather for a directed verdict of acquittal for the defendant Baker -- on the ground that there has been no showing that my client had any possession of the mail other than the possession given to him by agents of the New York City Police Department, and there's no showing and there's no evidence that it was not my client's intention to return that mail to the General Post Office, or some other place.

I would submit that there was no evidence whatsoever that anybody saw him in physical possession of the mail in the automobile, and there is no evidence

to submit it to the jury.

THE COURT: I think it is a question of fact for the jury, strictly a question of fact from the circumstances in the case, and your motion likewise as to both counts, is a question of fact for the jury.

Do you want the charge just to cover the counts of the indictment, or do you want the charge to cover count 1?

Count 1, of course, would be two charges; one on the gun charge, and the other is without a gun.

It is not the Government's duty to make a request of the defendant and I always found that the defendant wants a charge only on the count that he was involved with and nothing else included.

MR. CORBETT: I think the charge only should cover what's been alleged.

THE COURT: I would say so, either he was there, or he wasn't there.

MR. CORBETT: He was either there or wasn't there.

Mr. Lazarus is writing up his version of the contention.

MR. LAZARUS: It's finished.

MR. CORBETT: Let me read it?

Well, no. I can't. Here we go again.

THE COURT: Well, I'm going to charge -- why don't you let me see what it is and I will write my version.

MR. LAZARUS: Fine.

MR. CORBETT: Consider them as two requests to charge.

The first one is mine. The second one is Mr. Lazarus'.

MR. LAZARUS: Your Honor, if I may be heard?

Basically I object to his objection as to conceding. You can certainly tell them to disregard the testimony and take no inference from it. We have no objection to that. It's just a question of semantics of the Government conceding.

MR. CORBETT: It is just a question of semantics, why don't we say the Government admits?

THE COURT: I think I will do it this way: There is no proof in this case that the witness George Jeanette had an account in the East New York Savings Bank. Therefore, no inference can be drawn, or should be drawn.

One other thing: The Government requested an

aiding and abetting charge. How do the defendants feel about that?

MR. CHREIN: Well, your Honor, aiding and abetting as what?

THE COURT: As principals; that's what it amounts to in count 2 only.

MR. CHREIN: Your HOnor, I would submit that the aiding and abetting charge, especially in my denied motion for severance, it might give the jury an inference of my client and the robbery. I think they either possessed it or they didn't.

THE COURT: I'm not going to charge aiding and abetting.

MR. LAZARUS: The Government's position is that it's all connected.

THE COURT: Whatever I reserved decision on, upon the trial, and where I reserved motions, they are denied.

All right.

Bring the jury in.

(Jury entered courtroom at 3:06 P.M.)

THE COURT: All right.

Now, the case is completed. The lawyers will now go into summation with you.

Mr. Chrein is first, and each lawyer has been given a time limit. I will advise them when the time limit is up.

MR. CHREIN: Your Honor, Mr. Lazarus, Mr. Corbett, Madame Forelady, ladies and gentlemen of the jury.

You've heard the evidence in this case, and we have reached the time when the lawyers representing the varied interests in the case will sum up or argue to you what interpretations they hope you will draw from the evidence you have heard in this case.

Now, what I say, or what Mr. Corbett says, or what Mr. Lazarus says is not evidence. The evidence in this case is what has been said by the witnesses who have taken the witness stand, and taken an oath, and testified before you.

Now, during the course of my summation, I might have to refer to what a witness may have or may not have said. I have no notes, and none of the lawyers have a transcript in this case. When I refer to something in this case, it's what I remember a witness said. Your recollection and my recollection may vary. Since you ladies and gentlemen are the judges of this case, since your recollection is different from mine, it's your recollection that governs.

It is quite possible something might come up as to what exactly a witness said. Some of you might feel a witness said one thing and others among you might feel a witness said something else. If it is important and if the exact words of a witness are important, you, of course, have the right to ask the Court Reporter to read back what the disputed point is, so you can decide among yourselves, what really, in fact, was said.

Under our rules, this is the last opportunity that I will have to speak to you on behalf of Mr. William Baker. Mr. Lazarus will hear everything I say. He can answer each and every one of my arguments and I will not be given an opportunity to reply to each and every one of his arguments. This is fair, because if we permit argument, we can be here well into the night. I ask you in the course of your deliberations, to think of something that I might have answered. I would suggest that it is not only your right, but it is your duty to bring that answer to the attention of your fellow jurors.

Your decision in this case is going to be an extremely difficult one. You have two people on trial for two separate crimes. You have to sort out

the evidence, and as I said before, in my openings, put the evidence into the proper compartments. You also have the obligation to be fair and treat each defendant as if he, alone, were on trial for each crime.

Now, Mr. Baker is not on trial for robbing the post office. The only issue involving Mr. Baker is the question of whether he, at any time, possessed those eight registered letters, and whether he possessed them with the intention not to return them to the post office, or to deprive the post office of the use and possession of those letters. Mr. Baker told you that he first discovered the mail's existence when he went to Mr. Martin's house to return the registration of the car he had borrowed a week or two before. This is in no way contradicted by any testimony brought out by the Government. No one testified that Mr. Baker, before he came to that police station, was in physical possession of those letters.

Patrolman Iacelli, you recall, that's the officer who stopped the car on the street, didn't notice the mail when he stopped Mr. Martin's car on the street. He didnt notice the mail when he looked into the back seat and saw Mr. Baker sitting there; and he didn't

notice the mail at the bus stop when he told Mr. Baker he could go home. He didn't notice the mail until the car had been brought down to the police station by some other officer who had drove it and he went down to the car and locked it up. The policeman did not notice the mail in the darkened car because if you recall these events took place in March at about eight o'clock at night, if the policeman did not notice eight letters, that were, according to his testimony partly stuffed under the back of the front seat of the car, in a darkened car, it's quite possible a man getting into a car after dark, and riding around after dark might not have noticed those eight letters.

Mr. Baker told you he went to the police station not to claim the mail that was junk mail or whether he has a right to leave letters in that manner, that were junk mail is not the issue in this case. Mr. Baker told you he went to the police station not to claim the mail, but to claim his uniform. Mr. Baker said he tried to get his uniform at the bus stop and then went to the police station to claim his uniform.

You recall, when Mr. O'Neal was asked whether he said he came to claim the mail and the uniform or just the uniform, Mr. Baker told him he went to the police station to claim his uniform.

AM:pc take 2

Sergeant Greenspan, that's the Sergeant who gave the mail and uniform to my client, when questioned on cross examination told you he can't recall. He can't say whether Mr. Baker came to the police station to claim only his uniform, or came only to claim the mail.

Mr. Baker told you he did not know of the robbery until he reported to work the next day.

Now, there's been some testimony on rebuttal that Mr. Baker said to some postal inspector that he heard about the robbery around the streets in Brooklyn that night. Which postal inspector did he say that he heard about the robbery the night before? The agent was Inspector O'Neil.

O'Neil testified in the Government's entire direct case, and at no time did he mention that Baker told him he heard about the robbery the night before.

Inspector O'Neil was in this courtroom at the time the Government put the other inspector on to testify as to those conversations, those conversations with Inspector O'Neil.

Yet the Government had a man who took no

notes of this conversation, who was sitting in on this conversation and now remembers after close to three months, that Baker said he heard about the robbery the night before.

Mr. Baker took the stand, and was asked whether he told Agent O'Neil whether he heard about the robbery before and in your presence he never said that.

Now, let's look at the possibility of an innocent mistake in remembering a conversation that took place a number of months ago. The policeman didn't remember whether Mr. Baker came to claim the mail or whether he came to claim his uniform.

Inspector O'Neil didn't remember whether Mr. Baker said he was going to bring the mail to the Rochdale station where he worked, or was going to have his wife bring it to the general post office.

It's very difficult to recall a conversation after close to three months, and I submit that there was no proof over Mr. Baker's denial that he ever said he knew about the robbery the night before.

Now, as far as other evidence that you might use to infer whether or not Mr. Baker knew about the robbery on the night of the robbery, you can consider this:

John Connerly, Rubin, Carter and Sediana (phonetic) and Jones were all employees of the Rochdale station as was Mr. Baker.

I think that all of them testified they knew William Baker.

All of them testified in detail as to the events surrounding the robbery of the Rochdale station.

Only Mr. Connerly, specifically, testified as to seeing Mr. Baker specifically on that day. He remembered seeing him about 5:15 in the evening, or about three-quarters of an hour, almost an hour before the robbery took place.

It's true that 5:15 might have been an hour and 45 minutes after Mr. Baker's normal 3:30 quitting time, but you may recall as to when Mr. Carter testified, that Mr. Baker was the mailman who covered for vacationing mailmen. In fact, my client testified as to this score. Maybe he was familiar with the routes he had

to cover. I think Mr. Carter testified that there are about 100 routes in the station.

Any of you who have received mail, when they substitute a carrier or there is a replacement carrier, the mail comes through quite a bit late.

But in any event, it's perfectly understandable that a man might have to work a little later at the post office if his steady diet of work is to cover for vacationing postmen and to deliver mail on routes with which he's not familiar.

Now, in any event, no one saw Mr. Baker at 5:55 in the post office. Nobody saw him at 6 p.m. in the post office, and therefore, no one really contradicts Mr. Baker when he says that the first time he was seen in physical possession of the mail or that he knew about this occurrence was when he heard about it in the post office, the next day.

The witnesses who testified to the robbery could not recall the type of mailman's hat worn by the robber, but it's interesting to recall that each and everyone of them that

was asked specifically, recalls that the mailman's uniform, the part that was seen in the robbery was a postman's Eisenhower's jacket. No Eisenhower jacket was claimed at the police station. No Eisenhower jacket was inventoried among the items in Mr. Martin's car.

When Mr. Baker was questioned about why he didn't take the mail to the post office, Mr. Baker said he didn't have a car.

Agent O'Neal was unable to say whether the defendant also told him whether he or his wife was going to deliver the mail to the post office.

I would suggest that combining the parts of the statement that Mr. O'Neal does remember; well, I didn't take the mail with me because I didn't have the car. The part of the conversation that Mr. O'Neal doesn't remember: that my wife was going to take the mail down to the general post office. It makes more sense than the Government version, and it rings more true.

Mr. Baker testified he's allowed an hour for lunch. He testified, by public transportation, as he had no car, it would have

taken him about an hour and a half each way from the Rochdale station to the general post office.

It makes sense that I didn't take the mail with me to the post office, and my wife was going to take it to the general post office. It makes more sense that I didn't carry 8 letters to the post office. A man needs an automobile if he's going to deliver them to the general post office during his lunch hour.

Judge for yourselves which is the more reasonable explanation.

In your discussions, you might ask yourselves; how do we know what William Baker knew on March 23? How could we know if he knew the letters were in Martin's car when he was riding there? How can he know if he was a knowing receiver of stolen property?

Not a one of us in this room can read a mind, but we can analyze a man's guilt or lack of it.

If Mr. Baker knew the letters were in the car, and if Mr. Baker knew that those letters were stolen when he was stopped by patrolman Iacello, wouldn't he try to take them out of the

car with him? He had his postman's identification on him. He could have said: This is mail I'm leaving. But if Mr. Baker didn't know the mail was there, because the car was dark; if Mr. Baker didn't know the mail was there, because these 8 letters were stuffed under the seat of the car, of course, he would have no reason to try to remove the evidence.

If he had no knowledge that this was evidence, of course, he wouldn't try to remove it; and Patrolman Iacello testified that he didn't ask to take anything with him. He didn't ask to take mail with him. If Mr. Baker knew that stolen mail was in a police station, would he go to that police station, give his true name and accept those letters, which might be evidence of a crime?

Mr. Lazarus might very well argue Mr. Baker's uniform with his badge number was in the police station and perhaps the defendant Baker had to retrieve those items to avoid tying himself in with this car or crime.

If Baker had to retrieve his mailman's uniform with a number on it, he certainly would

walk in and say: I'm William Baker, a postman. I submit that a man knowing the mail -- the fruits of the crime -- could pick up a uniform and say: I don't know anything about the letters. I say that when a robbery takes place 6 in the evening and evidence that might link him to the robbery, a man who knows about a robbery, a man who has received the proceeds of that robbery isn't going to go to a policeman 8 hours after the robbery when the word might be out.

This isn't shoplifting. This is a robbery of a United States post office. It took place in the City of New York. There might be an alarm out on it. A man who has some knowledge of that robbery, a man who knows that identifying himself and going to claim those letters in a police station is going to tie him into the robbery. The last place he would go is to the police station and pick up those letters. I submit to you that him going to the police station and picking up those letters; that he didn't know anything about this at 2 A.M. on March 24th.

You could also draw the intent of Mr. Baker's attempt to deliver them back to the post office,

because they were unopened. He's charged with the unlawful possession of mail he took from the police station; that is that he possessed the proceeds of a robbery knowing that this was the proceeds of the crime, only as to those 8 letters that were taken from the police station at 2 in the morning.

He and his wife had the mail at home, from 2 o'clock in the morning on March 24 until the time that Inspector O'Neal came to claim that mail, sometime around noon.

If it wasn't his intention to return the mail to the post office, why would the mail be unopened?

If he was going to steal the contents of the letters, wouldn't he have looked in there to see if there was anything of value?

If he knew of the post office robbery at the time he picked up those letters, he could have torn off the letters. He could have dropped them off any place between 2 in the morning or noon. There would have been no evidence or arrest, and Mr. Baker would not have been put to the need of defending himself in a courtroom.

If he knew of those letters, and if he knew that they were the proceeds of a robbery, would have tell the post office inspectors that my wife has them? Don't forget, the postal inspector brought them down from the house unopened. That certainly indicates what was in Mr. Baker's mind. Whether he knew of this robbery; whether he had the intent of depriving the post office of the mail with the knowledge that they were the proceeds of a crime.

If that has not been proven, you must find Mr. Baker not guilty.

I submit that there is a reasonable doubt enough to acquire an acquittal of Mr. Baker. Such a reasonable doubt from the fact that no large sums of money; no pistol, no money order machine, no stolen money order was taken from Mr. Baker or any relative of his.

If such property was taken from Mr. Baker, his house, his wife, or any place under his control, you would have certainly heard about it during the course of this trial.

Mr. Baker's conduct at the police station can hardly be that of a knowingpossessor of

stolen goods. A reasonable doubt can arise from the unopening of the letters, and I submit on the entire case, there is more than a reasonable doubt of Mr. Baker's guilt, and I submit to you that he should be found not guilty.

Thank you very much.

THE COURT: All right.

OPENING BY MR. CORBETT:

MR. CORBETT: Judge Costantino, Mr. Lazarus, Mr. Chrein, Madam Foreman and ladies and gentlemen of the jury:

As you know, I represent Heyward Martin, who's indicted on two counts. The first count, of course, is the one about which we've had most of the testimony and that is the question of the armed robbery of the Rochdale Village Queens post office.

Now, of course, there we have the classic type of case, where the people who are present at the robbery, come in and positively identify Heyward Martin.

Now, you ask yourselves, are they lying?

No, they are not lying. They believe that the man who came into that Government office

with a shotgun was Heyward Martin. I think they honestly believe that.

I think you will agree with me that there's no question that it took place on the 23rd of March. This is not a grocery store, where the man says yes, it was last Tuesday. This is a Government agency. The 23rd day of March, when arrests were made on the next day, the 24th, there's no question that this was on the 23rd day of March.

We had witnesses here. We had two witnesses testify on behalf of Heyward Martin, that he was with them on the 23rd day of March, from 5:30 to a quarter to seven or 7 o'clock, in Brooklyn.

The post office is out in Rochdale Village, in Queens. He wouldn't be in the Rochdale Village post office with a shotgun and be in Brooklyn with Mr. Hager and Mr. Jeanette, both of whom testified here.

How can that be? How can that come about? I say this to you, ladies and gentlemen; When a holdup or a stickup takes place, something happens to the individual against whom a pistol, a gun or a shotgun, whatever it might be is

being pointed. Something happens to that individual. The old adrenaline starts to run. The individual becomes upset and at that time, the individual who was suddenly confronted with a holdup is a different individual than the one who, five minutes before that was going about his or her daily work.

We have the post office that was closing up -- closed up at 6 o'clock.

Connerly came with the truck and the back door was open.

Mr. Carter and Mr. Connerly started to bring the mail sacks to the back and suddenly an individual appears in what seemed to them to be a postman's uniform.

He's got a postman's sack on his back, and then out of that sack appeared a shotgun.

Everyone said it's a shotgun. No one can tell us whether it's double-barrelled, and those of you who are familiar with shotguns know that they are two barrels, side by side.

As a matter of fact, Connerly thought it was a stick, until he grabbed at it. This is a nice quiet little post office. At that

moment, each of those individuals who were present had a terrible shock, and each of you would have the same shock if you walked out of this building and an individual pointed a firearm at you.

These individuals were suddenly frightened and confused. Rubin Carter, the very capable superintendent of the post office, testified he was so scared he couldn't open the safe.

The robbery men wore a postman's cap. A man who works in a post office agency, would naturally look to the number of the cap. The man was so terrified, and he testified it was 10 minutes that he was with the holdup man, but still he never looked at the number. He didn't look at anything.

Connerly, of course, was the first one to be confronted.

Now, as far as Mrs. Jones is concerned, you heard her direct examination when she was so positive, and you heard my cross examination, pointing out to her that she was not so positive at the time we had a lineup downstairs.

How? What happened to these people? Why

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did they sit here on the witness stand and say: That's him over there?

Well, something happens when an arrest is made. The persons are informed. They haven't seen the defendant, but they are informed and an arrest has been made, and now we can all sit back because the agents of the United States Government, the police agency, whatever it may be -- has moved. These agencies which guard our security have moved and now they have got a man. So help me, if I was the right color and I was brought in there, I would be identified. I would be identified, because these individuals, being informed an arrest has been made are ready to believe and accept that the enforcement agency has done its job and the right person has been secured.

Now, let's look at Heyward Martin.

We had William Baker, remarks were made of the fact that Lily Baker lives with Heyward Martin. Nobody mumbled words over it, and I say to you, so what? Does the mumbling of words bring virtue and happiness? If so, we wouldn't need a divorce court . Lily Baker stays with

Heyward Martin because she wants to, and I submit the fact that because Lily Baker and Heyward Martin have not had words mumbled over them, that does not destroy the fact that she was worthy of belief. She was subjected to a rigorous cross examination. She was not shaken on that cross examination.

The next witness he presented is George Joanette, a hard-working man. He said he worked for a dye-works for over 17 years, married with four children, and no criminal record of any kind. He testified there was no possibility of error. No one shook any of the identification of these people or the fact that they pointed out it was the 23rd day of March.

These two people testified. They were not lying. You had an opportunity to observe them and I say to you, of the two sets of witnesses, and that's the hard part of a jury, you can't sit down and say, "Well, one side had X number of witnesses and the other side had Y number of witnesses, and X is greater than Y and X must win.

You must examine the circumstances under which the witnesses made the observations.

Lily Baker and Mrs. Jeanette testified they knew this man for many years, they knew the man they were with was Heyward Martin.

The individuals from the post office testified they never saw Heyward Martin or the man that held them up before that. So I submit to you that a reasonable doubt has been raised as to whether or not Heyward Martin was actually present at the holdup. I submit to you that no other decision is possible, that a reasonable doubt has been raised under the circumstances.

I think Heyward Martin is entitled to an acquittal on count one, on the charge of the post office holdup.

Remember one thing too:

Heyward Martin -- Patrolman Iacello picked up Martin at 8 o'clock. The post office was held up at 6 o'clock. Patrolman Iacello picked him up at 8. What happened to the gun that was allegedly taken from the post office? The post office employee said there was a gun, a machine, a sum of money -- where were all those? They were not in the possession of Heyward Martin, and can you rest assured, when they got Heyward Martin

in that stationhouse, he got a frisking and searching. If Heyward Martin had come into that holdup, certainly there would have been some evidence of some of the money, a few thousand dollars or a handful of money orders.

You can rest assured that the Government would have brought it out.

Now, let's look at the second count for a moment.

Heyward Martin was charged jointly with Baker with unlawful possession of the mails.

Now, where is the mail found? Heyward Martin is driving a car belonging to a friend of his -- this is Iacello's testimony. Heyward Martin is driving a car; parked it in a bus-stop. Where was Baker sitting? He was sitting on the right-hand side, said Patrolman Iacello.

The postman's uniform -- whatever it may be -- was alongside of him. The mail was on the right-hand side, under the front seat.

Now, with all due respect to my worthy colleague, Mr. Chrein's client, I say, is a postman who was sitting in the back seat with the pieces of a postman's uniform, which were

his, and registered mail at his feet.

Now, no one has put Heyward Martin in possession of that mail in this case. No one has put him in possession of the mail. Iacello didn't say: When the defendant went in the stationhouse -- perhaps he couldn't say he had it in his pocket. Perhaps he could say he dropped it from his pocket, the classic. No, it was in the back seat of the car. It wasn't in Martin's possession.

I don't see how we have any conviction on unauthorized possession of mail.

One thing more:

Consider again the circumstances under count one. These individuals are being tied up, put on the floor, this is not a pleasant thing.

As a matter of fact, they are rather vague. They never even saw the second man. Sure they saw the second man. John Carter said he had a 38 in his hand. But, could you describe the man? He was tall. He's a vague figure, and you know why he's a vague figure? Because there is no one sitting at the tables

here labeled a defendant. Put a tall man at the counsel table and the Government witnesses would say, there he is. That's him. Yes, these people were terrified, frightened and I submit to you that their identification is worth nothing.

The fact that they attended a lineup downstairs -- well, when you go into a lineup, you see a group of people. You look around.

I say to you, with the question of identification at the lineup, the man who held up the post office may have looked like Heyward Martin. After all, there is nothing very distinguished about Heyward Martin in appearance. He is an ordinary man, an ordinary black man. There is nothing outstanding in his appearance that would stick in anyone's mind.

The possibility is that someone who held up the post office may have looked like Heyward Martin, but I say to you, how could he have held up the post office when he was in Bedford-Stuyvesant, in Brooklyn, at that time.

I ask you ladies and gentlemen, in considering the evidence to weigh these factors, and I strongly suggest that there is a reasonable

doubt as to the guilt of Heyward Martin. Under those circumstances, I say, under your oaths, you must acquit.

THE COURT: All right, Mr. Lazarus.

SUMMATION OF MR. LAZARUS:

MR. LAZARUS: Your Honor, Mr. Chrein, Mr. Corbett, Madam Forelady, ladies and gentlemen of the jury:

I have the opportunity to speak to you last. I will attempt to answer all the points made by both defense counsel.

They have had the opportunity to create the first impression in your minds. However, if I fail to answer all the points raised by them, the Government simply asks you to consider the Government's answer in light of all my remarks.

Now, there is no question on the night of the 23rd of March, 1972, that there was an armed robbery of the Rochdale Village post office station.

You heard all the witnesses testify to that. There was no question as to what was taken in that particular robbery; stack of

mail, 600 postal money orders, a machine that printed money orders and a pistol.

There was no question that the men who came into that post office were wielding guns, that they threatened the people in this post office and threatened their lives.

In fact, Rubin Carter was threatened into opening the safe; "We know you have a little girl. You'd better open it."

Heyward Martin said this.

The only question, and there should not be a question in your mind, as to who committed that robbery. Look at the evidence placed before you. There was not one, not two, not three, but four separate individual identifications of that man, Heyward Martin.

Here is a man who is the man who came in wielding that shotgun and not only were there four separate identifications, there were, in fact, 8, because each of those four people picked him out twice.

Once in this courtroom, and once at the lineup.

Mr. Corbett alluded to the fact that if

he was the right color, he would have been picked out.

There was 7 black males in that lineup. That was the testimony. All of the same general height and appearance. No one picked out any one of those other men. They picked out Heyward Martin. Each and every one of those people picked out Heyward Martin.

It may have been dark outside, but the testimony was clear that all the lights in the post office were on and burning and they threw sufficient illumination for each and every one of these people to identify Heyward Martin.

Rubin Carter, the superintendent of the post office, spent 10 minutes, while he was going to the safe and getting out everything that the robbers wanted. 10 minutes. It seemed like a lifetime. It burned into his mind the identity of the man who was standing there, pointing a shotgun at him.

Mrs. Jones testified and again it would be your recollection that governs, but Mrs. Jones testified that she said, at the lineup, she thought it was the man. She said, "I think

it's him."

She also testified that "Yes, it was him." But, she was afraid to say it there, and the more she thought about it after she left, the one individual she picked out she thought was the man.

Now, this might be a reasonable doubt if we were only dealing with Mrs. Jones, but we're not only dealing with Mrs. Jones, we're dealing with the three other individuals who positively identified Heyward Martin, both at the lineup and in court.

If there was anything unfair about the lineup, he was there, as the witnesses testified. He was there to protect the interests of his client. What we have is four separate good identifications at the lineup. What you have before you are the same identifications in the court.

Further, the cross examination of the first witness, and that was John Carter, Mr. Corbett went into great lengths to show that there wasn't sufficient light, and that John Carter did not really get a good look at the defendant Heyward Martin. What was John Carter's answer if you can recall? His answer was: "I would recognize

that man any place in the world. Any place in the world. Any place in the world, ladies and gentlemen, and he recognized him twice as well as the other people. The defendant Heyward Martin alluded to his alibi defense. The Judge is going to charge you on the credibility of the witnesses. You're going to have to look at the interest each witness bears to each side of the case.

Lily Hager, and the Government did not make a big deal out of whether she is married or not married -- Lily Hager lives with Heyward Martin. Lily Hager is Heyward Martin's meal ticket. She has a child by him. She stands a lot to lose if he is not there.

George Jeanette is an old friend of Heyward Martin's. Would a friend want his friend to go to jail? Maybe this would create a reasonable doubt, but the problem is as far as the defendant, Heyward Martin is concerned, is that mails were found in a car that he was driving two hours after the robbery took place.

When you put it all together, ladies and gentlemen, as to the robbery count, as to Heyward Martin, it's not mere coincidence, it's

proof of guilt beyond a reasonable doubt.

As to that mail, the Government's evidence has been introduced, and if you wish to take the evidence into the jury room with you, you must ask for it, and please ask for it.

You will see from the stipulation, the names and the addresses of the people that the mail was going to. You will see that the sack that was cut open, testified to by Rubin Carter has a lock on it and there are numbers that correlate to a card that was on a receipt that was found listing the stolen mail, or listing the mail that was in that package. It bears the same numbers as to the post office receipts of the registered mail. They too have the numbers.

By looking at all this evidence, as well as the 8 letters, you can determine that what was found in the car driven by Heyward Martin was, in fact, the stolen mail.

So, in fact, the four identifications and the fact that he was found with the mail, approximately two hours later.

Now, Mr. Corbett mentioned about Lily Hager, if you recall her cross examination; she

first said that she was watching television and she was watching Marcus Welby.

Then they had to change that, because she realized he wasn't on on Thursday night.

Then she changed it to a show that was on a Thursday night.

Mr. Corbett alluded to the fact that why weren't the other items found? There must have been a good search and frisk in the police station.

(continued on the next page.)

Ladies and gentlemen, at the time he was arrested for traffic violations. Do the police usually conduct a thorough search of someone who is arrested for traffic violations?

Bear in mind that all the officer did was find what was sticking out from the back seat. He didn't go into the glove compartment of that car, the trunk of that car. That car was given to Heyward Martin after the two summonses. If you find that, the Government contends you must -- that he in fact stole the items, then his possession started at that time and his possession continued.

As to the defendant Baker, Mr. Chrein pointed out it was unclear as to whether or not he came in for the mail or whether he came in for his uniform.

But the testimony of Sergeant Greenspan, in response to the cross examination -- in other words, the questions of Mr. Chrein was that the defendant William Baker told Sergeant Greenspan that the mail was undelivered mail from his route, that he was going to deliver the next day.

That was the testimony.

You heard the testimony of Rubin Carter as well as the testimony of William Baker, that he had no business with registered mail.

Mr. Chrein made a point as to why Agent O'Neal didn't testify as to the prior statement of William Baker as to when he found out that the robbery took place.

Had Mr. O'Neal testified, Mr. Chrein just could have very easily have said, there were three other agents there, why all the testimony from one witness?

Mr. Chrein talks about a conscientious mailman who works late, but he testified that he punched out at 4:15. Did he work late without pay until 5:15? When, by the testimony of John Connerly, a gentleman, who grabbed at the shotgun, who thinking first it was a stick, that William Baker let him in the door.

This is the same conscientious mailman who said that the mail that was in Hayward Martin's car must have been junk mail that I was going to throw away.

Does a conscientious mailman throw away mail? This is what Mr. Chrein tried to bring out.

There was argument by Mr. Chrein as to who was going to bring it to the post office and when and why it would be more convenient for one person or another to bring that mail to the post office. Was it more convenient for William Baker to let his wife take the mail to the post office, where they didn't have a car and she would have to take public transportation, or was it more convenient for William Baker to take it in with him, the next morning to work, unless he knew it was stolen mail.

Initially, you heard there was courier runs from the Rochdale station to the general post office in Jamaica.

Why was not the mail taken there?

Then, there is the crucial question of why did William Baker go to the police station at 2A.M. in the morning; an innocent mailman attempting to pick up his uniform.

Ladies and gentlemen, he was in the car when it was stopped two hours after the robbery. He could have been identified, being in that car when it was stopped two hours after the robbery. He worked at that post office.

There had to be an investigation into the robbery. Would his name ever come up? An additional part of the material that was in the post office was his hat, with his badge number, as alluded to by defense counsel and their argument that that traces it directly to him. He had to go to that police station and get those proceeds back, and that's what he was doing there.

Look at the testimony. He went there at 2 A.M. Even the defense counsel conceeds that in their argument. That's what Sergeant Greenspan testified to. That's what the wife of the defendant, William Baker, testified to.

She testified they arrived home late in the morning.

Yet, William Baker testified they were there between 11:30 and 12, a half hour later.

The plain fact is that they were there at 2 A.M.

The question keeps being asked: Why didn he not bring that mail in the next morning when he went to work at 6 o'clock?

Additionally, if you recall the cross examination of William Baker and you heard the

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testimony of the other witnesses, it would be only natural that the general topic of conversation in that post office, the next morning, would obviously be the robbery the night before.

First, he admitted that it was the general topic of conversation and that's when he found out that the letters were stolen.

Yet, at that time he had made no effort to come forth and tell them he had some registered mail which he wasn't supposed to have.

Yet he told them that he didn't realize the mail was stolen until Agent O'Neal came to the post office and started to question him about it.

Then, he said he didn't tell anybody about the mail because he was scared. That's prior to being questioned by Agent O'Neal.

What was he scared of, if he didn't know that the mail was stolen? Why not dispose of the mail? Why did he have it in his house? Why did he take it home with him?

You heard the testimony that registered mail is more valuable mail. It's mail that many times has money in it.

He obviously did not have an opportunity to look through it. He took the mail sealed. It was known he took the mail sealed from the police station.

Was it so he took it home and he arrived home very late in the evening and he had to be at work at 6 o'clock.

The mail was in a safe place. He could leave it until he had a chance to go through it and determine what was in that registered mail.

As to some of the other inconsistencies in the testimony of William Baker and the testimony of William Baker relative to the other witnesses, that the uniform that he had to go run down to the police station at 2 A.M. in the morning, for it had been in that car a week and a half, at least a week.

All of a sudden he had to get that uniform. Why, if not to obtain the evidence of his own guilt?

Mrs. Baker, who also has an interest in the case, she's married, has a child, obviously does not want to see her husband go to jail, testified that one of the reasons why she did

not bring the mail to the general post office on the morning of the 24th of March, and apparently the main reason was because she had a child that she had to get off to school.

Then she testified that somewhere between -- between 8:30 and a quarter to 9, the child went off then to school.

Yet, the mail wasn't brought to the post office, any post office.

Can you believe the testimony of the defendant William Baker when he says that he's told by the defendant Heyward Martin that there was some registered mail in the car.

"No, it couldn't be registered mail, because I wouldn't have anything to do with registered mail."

And he goes down to the police station and while being there he picked up the registered mail and he looks at the registered mail numbers and you too may look at it and right on the face of each and every one of those documents is the postmark of the Rochdale post office station and the date, the 23rd of March, 1972.

Did he just see the registered mail numbers,

or did he see it all?

And then you heard the testimony of Agent Shovlin on the stand.

He has not had that many other interviews and he clearly remembers this one that William Baker knew sometime between 8 and 9 o'clock on the evening of the robbery that that mail was stolen.

A statement that William Baker denied making.

In summation, upon all of the evidence placed before you as to the identity of Heyward Martin, because nothing else is in question as to the robbery and as to the knowledge of William Baker that the mail was stolen and that really is the only question with that particular offense.

The Government contends that you must return a verdict of guilty beyond a reasonable doubt as to both defendants, as to both charges, and again they are both charged with the possession.

Heyward Martin, alone, is charged with the robbery.

Thank you very much.

THE COURT: All right.

I'll give you a five minute recess and then we'll have thecharge of the Court.

(Recess taken at 3:57 P.M.)

(Recess over at 4:10 P.M.)

MR. LAZARUS: They are going to go out and deliberate?

THE COURT: Yes, otherwise I wouldn't charge them. This is a short week.

(Jury entered the courtroom.)

THE COURT: All right.

Madam Forelady, ladies and gentlemen of the jury:

We now come to the final stage of the proceedings, where the Court will charge you on the law.

I asked you to listen very attentatively. I will be as expeditious and simple as I possibly can under the circumstances, giving you the law to be applied to the various counts in the indictment.

As you know by this time, in any event, that there are two counts in this indictment. You know the defendant Heyward Martin is charged

in Count One, and that the defendant Heyward Martin and William Baker are charged in Count Two.

Now, the fact that there are two counts becomes incumbent upon you as to how to weigh the testimony in each of the respective counts.

Any testimony that came in reference to count one would be that testimony which you are only to consider in reference to count one.

Any testimony in reference to count two, as to William Baker, you must be able to separate that evidence as charged against Martin and Baker so that each one may be particularly and specifically considered by you as individuals in both counts.

After doing that, then, of course, you may come down to the determination as to which of the two are guilty in which of the respective counts.

So it is a question of separately being able to determine which evidence applies to which defendant, because there is some evidence that was submitted to you that had nothing to do with William Baker. There was some evidence

that had to do with both defendants at one time.

You are the ones that are to determine which would apply.

I will go on to the various definitions to be applied to the case.

In this case we have four definitions which you should know and some other general matters that should come before you in order for you to determine the issues that have been submitted to you.

In this case, we have four definitions which you should know and some other general matters that should come before you in order for you to determine the issues that have been submitted to you.

The first definition you should know is the one involving a motive.

Now, intent and motive should never be confused. Motive is what prompts a person to act or fail to act. Intent is the state of mind under which the act is committed.

One is what you do because of considering or thinking about it and the other is what prompts you to do it; the performance of the act.

Sometimes we recognize as such human conduct as that which may prompt a person to do voluntary acts of good and another person to do voluntary acts of crime.

Good motive is never where the acts done or intended to be done results in the commission of a crime. So the motive is immaterial except as when it may aid in the state of mind or intent resulting in the commission of crime.

The act, the statute I will read to you, the criminal statute, will have the word "knowingly."

"An act is done knowingly and voluntarily and intentionally and not because of mistaken actions or other innocent reasons."

The purpose of adding the word knowingly is to insure that no one will be convicted for an act done because of mistake or accident or other innocent reasons.

With respect to an offense such as charged in this case, specific intent -- and that is the possession -- must be proved beyond a reasonable doubt before there can be a conviction. This is as to both counts.

Unlawful, of course, means something that is contrary to law, and that is exactly what it means in its simplest terms.

The last definition you should know is the one concerning wilfully, and of course, an act is done wilfully and done voluntarily and intentionally, with specific intent to do something the law forbids; that is to say, with bad purpose, either to disobey or to disregard the law -- that is when it is done wilfully.

Now, as to credibility of witnesses -- and the defendants have testified in this case, and we have had the wives of the defendant testify; we have had special agents of the Government give testimony, and also a police officer.

All of the witnesses, with the exception of the police officer, were interested witnesses and interested because they have either direct or indirectly and stake in the outcome of the case, they were connected with the case one way or another.

Now, the law of course recognizes that just because a person is interested in the outcome of a case, either directly or indirectly, that

that person necessarily will not come before you and tell an untruth or a lie.

The law recognizes that persons can be witnesses on any side of the case and tell you what the truth is.

The law, likewise, recognizes that a person can be interested in the outcome of a case and tell you what they believe rather than what the truth is.

(continued on the next page.)

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If you feel that any witness has come here to tell you what they want you to believe rather than what the truth is, after weighing the testimony in the matter which I will tell you to weigh it, in which I have told you under the original charge, then, of course, under the law you have a right to disregard that testimony; that is, you must weigh the testimony before you disregard it.

You take those matters which are material to the case.

For instance, the happening of the robbery itself, or the question of possession of mail, or the question of the taking of the mail, the question of the police station, these are material facts in the case.

Now, if you find that any witness lied, as to a material fact in the case, you have the duty under the law to disregard the entire testimony of that witness or that portion which you believe to be untrue.

The law likewise gives you the privilege, if you are able to do so, to take any of the testimony and weigh it and disregard what you

believe is untrue and accept that which you think is true.

After doing that, then, of course, you weigh the balance of the testimony you do accept.

Now, wherever there may be inconsistencies on one side of the case or the opposite side of the case, the law requires of you to weigh the inconsistencies so you can reconcile them.

There may very well be inconsistencies that may not be part of the issue, but if you can reconcile them into the picture which has been drawn for you, then, it is your duty to do so.

Now, as to the credibility of witnesses: every witness who takes this witness stand places his credibility in issue; that is, every witness that takes the witness stand, his testimony must be weighed for truthfulness and honesty as respects the testimony which he gives.

Of course, you must understand that a person's credibility is at issue. You just can't say, "I'm not going to believe him or disbelieve him."

What you must do is weigh the testimony

of that witness, the frankness with which the answers were given, the demeanor of the witness on the stand, the honestly with which the questions were answered, the knowledge or lack of knowledge of the subject matter about which the testimony is given, these are the measuring sticks you use;

In other words, what you do is you size up the witness, and, putting it in colloquial language, from sizing him up, you determine whether or not he has genuinely placed his credibility in such a state that he has shown his dishonesty, or placed his credibility in such a state that you believe him, and that he has shown his honesty in the matters that he has testified to.

But, in any event, it is for you to determine from these items that I have given you, as to the credibility of any witness.

Now, in order to come to that conclusion, you are not to determine the credibility of a witness by likes or dislikes of any witnesses that might have taken the witness stand.

You are not to determine by reason of

bias or sympathy of any witness that took the witness stand, or by any reason of fact that you just don't like that type of person or their type of employment.

You see, that is not how you do it. You do it like I say, you weigh it like you would in general ordinary circumstances of your life, with the good ordinary common sense the good Lord has given you.

When you do that, you will be able to determine how credible the witness that has come before you on the witness stand has been and how truthful he has been in telling you about the incident about which he was asked to testify.

Now, there has been talk about the indictment alleging on or about, and of course an indictment need not allege the specific day.

The indictment does say:

"On or about the 23rd day of March, 1972" -- and these are terms and phraseology that is used in the law and need not be specific, but, in any event, the testimony does revolve itself about the 23rd day of March, 1972.

Now, as to the indictment itself, we have

first the United States of America against Heyward Martin, also known as Skeets, and William Baker, defendant, and the Grand Jury charges -- and I will go into count one first, and count one, as I have told you, applies merely to Heyward Martin:

"On or about the 23rd day of March, 1972 within the EAstern District of New York, the defendant Heyward Martin, also known as 'Skeets' and other persons to the Grand Jury unknown, did rob approximately 8 registered letters, 600 blank United States Postal Money Orders, one Friden print-punch money order machine and one 38 Caliber Colt detective special revolver, from persons in the control and custody of said United States mail and said property of the United States and the Rochdale Village Postal Station, Jamaica, Queens, New York, and in effecting said robbery, the defendant Heyward Martin, also known as 'Skeets' placed the lives of the custodians of said United States mail and said property of the United States in jeopardy by the use of a dangerous weapon, to wit: a shotgun. (Title 18 United States Code, Section 2114)."

As I have explained to you, that count in the indictment is merely a charge, an accusation and is not proof of this defendant being guilty of any crime.

The proof of the crime must come from the witness stand and the defendant must be proven guilty as to this count beyond a reasonable doubt and I will tell you subsequently what the principles of beyond a reasonable doubt are, and explain them to you.

Now, Title 18, United States Code, 2114 reads as follows:

"Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or any money, or any property of the United States, shall be guilty of an offense against the United States."

It likewise charges:

"And if in effecting or attempting to effect such a robbery he puts in jeopardy the

life of the person having custody of such mail, money, or other property of the United States by use of a dangerous weapon, shall be punished by law."

There are 4 essential requirements to be proven by the United States Government beyond a reasonable doubt in reference to this count and this statute, the first of which is that the act or acts of robbing mail matter or any other property of the United States is charged, the Government must prove that there was a robbery of these mail matters or property from the postal offices.

Secondly, that the person robbed has lawful charge, control or custody of the mail matter, money or other property of the United States that was robbed.

Third, the act or acts of robbery were with the specific intent of robbing, stealing, or purloining mail matter or money or other property of the United States.

Fourth, that the acts were done in a manner placing in jeopardy the life of the person having such mail or money or other property of

the United STates by use of a dangerous weapon.

Now, a dangerous weapon includes anything operated or wielded or otherwise used by one or more persons to inflict severe bodily harm or injury upon another person.

So an operable firearm such as a pistol or gun capable of firing a bullet or ammunition may be found to be a dangerous weapon.

Now, to put in jeopardy, of course, goes without saying that by the use of that weapon you expose a person to fear of his life or to a risk of death.

Now, in this case, you may infer a gun used during a robbery was loaded, in the absense of direct proof that the chambers contained bullets.

Now, likewise, in this case, there has been what is known as direct evidence and circumstantial evidence.

Now, very, very simply, direct evidence is evidence which has been testified to that they have full factual knowledge of; circumstantial evidence is that evidence which, because of a chain of events, or chain of

circumstances or chain of facts either tend to prove the guilt or the innocence of the defendant.

Circumstantial evidence is not the actual factual knowledge, but the circumstances that are involved that have been testified to.

Both of those, in any event, must be proven and there is no distinction between them.

When it comes to the question of proof, both must be proven as to the guilt of this defendant beyond a reasonable doubt.

We have likewise in this case, the question and issue of the identification, which is in count one. The Government must prove when that is placed in issue to your satisfaction beyond a reasonable doubt that the identification made of this defendant was made under circumstances that the persons who made that identification knew him to be the person whom they say committed the charge that was charged of him in count one of the indictment.

The Government must prove that this defendant was identified beyond a reasonable doubt.

The second count in the indictment is

that of possession of stolen mail. The indictment reads:

"On or about the 23rd day of March, 1972, within the Eastern District of New York, the defendant Heyward Martin, also known as 'Skeets' and the defendant William Baker, did unlawfully have in their possession 8 registered letters addressed to the following addresses:

"Mr. Emile Mathieu, Avenue Bon Zon No. 15 (21-Etate), Port-au-Prince, Haiti, W.I.; Admin. ABJ. Bureau, Quail Street Station, P.O. Box 6079, Albany, N.Y. 12206; Pension & Relief Section, 240 Centre Street, New York, N.Y. 10013; Town Hall, Town of Keene, Essex, County, N.Y.; Senor Cristobal, Montalvo, Ciudadela Bolivariana, Manzana 'H', Villa #8; Guayaquil Ecuador, S.A.; Cement Mason's Local 780, Vacation and Annuities Fund, 485 Fifth Avenue, New York, N.Y. 10017; Mr. John M. McDonald, 1008 Cale Street, Durham, North Carolina 27701; Mr. Otis Simmons, c/o Puri, 143-16 Farmers Blvd., Springfield Gardens, New York 11434, which were stolen from the Rochdale Village Postal Station Jamaica, Queens, New York, the defendants knowing the

same to have been stolen. (Title 18 United States Code, §1708 and §2)."

Section 1708 reads:

"Whoever steals, takes or abstracts or by fraud or deception obtains or attempts so to obtain, from or out of any mail, post office or station thereof, letterbox, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag or mail, or abstracts or removes from any such letter, package, bag or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

"Whoever steals, takes or abstracts, or by fraud or deception obtains any letter, postal card, package, bag or mail or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

"Whoever buys, receives or conceals, or

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unlawfully has in his possession any letter, postal card, package, bag, or mail or any article or thing contained therein, which has been stolen, taken, embezzled or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted is in violation of the law."

The portion of the statute that applies is the last part which is the one as to possession.

Now, in count two, both defendants have been charged with the crime of possession. The mere fact that the mail is in the car cannot charge both of these defendants with possession of the mail. It may be that you have heard somewhere along the line that matter in the car will be deemed to be possession; that is not so in this case, because it may have been that some of you have sat on juries and may have heard that statement made. That is in reference to some other type case, but not as to this mail case.

In order for these defendants to be convicted of possession, there must be proven that they knew the mail was stolen and that they

possessed it unlawfully in violation of law, contrary to law and it was in their possession and of course it cannot be in their possession by mistake or inadvertance or some other innocent reason. It must be in violation of law and knowing it to have been stolen.

If you find that the Government has proved that the mail was in the possession of one defendant or both defendants beyond a reasonable doubt, then, you would say that they are guilty of that count.

If you find that the Government has failed to prove that they possessed the mail knowing that it was stolen, then, of course, you would say that they are not guilty of that count and you would acquit them.

Now, just in passing, of course, it is not necessary that the Government prove that the defendants knew from where it was stolen. The only requisite of the Government is to prove that it was stolen and they had possession knowing that it was stolen.

Now, we come down to that principle of law which you must apply to the evidence in

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the case.

This is known as the principle of beyond a reasonable doubt.

Now, the law, of course, as I have told you, presumes a defendant to be innocent of the crime, thus, the defendants, although accused, begin the trial with a clean slate and no evidence against them.

If you will notice, the Court made various rulings as to the evidence that would be permitted during the trial, and likewise as to the questions that would be permitted to be answered by the witnesses that took the stand.

Only by legal evidence that has been prefferred before you, and by way of questions and answers and documentary proof, so that the presumption of innocence alone is enough to acquit a defendant unless you jurors are satisfied beyond a reasonable doubt of a defendant's guilt after careful consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all doubt. The test of

reasonable doubt is one based on reason and common sense. The kind of doubt that would make a reasonable person hesitate to act.

Now, proof beyond a reasonable doubt likewise is the proof of such a convincing character that you would be willing to rely upon it and act upon it unhesitatingly in the most important of your own affairs.

The jury will remember that the defendant is never to be convicted on mere suspicion or conjecture.

The burden of proof is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant, because the law never imposes the duty of calling any witnesses or producing any evidence.

A reasonable doubt exists, when, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

So, if you, the jury review the evidence in the case as permitting two conclusions: one of innocence and the other of guilt.

You, the jury, should of course adopt a conclusion of innocence.

As to the witnesses; to give you one additional charge, as to George Jeanette, who was one of the witnesses on the defense side, an alibi witness; needless to say, an alibi witness is a person who testifies that the defendant could not have possibly been the one who committed the crime, because at the time the crime was being committed, he was somewhere else and doing something else.

George Jeanette, if you recall, was the witness who came here to testify as to his association with William Baker. His testimony in no way reflects upon William Baker, as I wanted to charge you that as far as George Jeanette is concerned, there is no proof that he had an account in the East New York Savings Bank and you are not to draw an inference from any of the questions that were asked to that; nor, is there any proof that this George Jeanette cashed any money orders at the East New York Savings Bank and no inference is to be drawn from that either way for either side.

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Now, when you have arrived at a verdict and of course you may announce that as the verdict in the case and you must be unanimous and of course as jurors, you have taken an oath that you will abide by that oath and that you will weigh the testimony in this case that you do so without bias or sympathy, and you also have taken an oath that you will deliberate honestly among yourselves.

That means, of course, when you go into the jury room that you talk to one another and that you discuss the problem that faces you.

You may, in your arguments accept the summations or arguments of a lawyer, either in his opening statement or his closing argument.

You may discuss what the lawyers said they were going to prove or failed to prove. That is not evidence in the case, but that will assist you in making your own argument, you may adopt those arguments in coming to your conclusion.

Of course, this Court does not tell you that you do not have a right to disagree. You have a right to disagree, but the Court does say to you , in order to be a jury in this court, that you should deliberate honestly and

fairly among yourselves, and listen to your fellow jurors until a conclusion can be reached.

If anyone has an absolute honest disagreement, no one says that you should accept a statement of the others.

If you find that any of the testimony is not fresh in your mind and the testimony is not sufficient to come to a conclusion as to anyone in the case, you may ask this Court to have the testimony read back to you and it will do so.

You may have the exhibits, required exhibits in the deliberating room with you to determine the issues that face you.

(Jury left the courtroom at 4:40.)

(continued on the next page.)

M:Pc
eel 5

MR. LAZARUS: Your Honor, you spoke about the 23rd of March, and in our request, 11 and 13: "that you infer the recent possession of stolen goods that they were stolen."

THE COURT: Well, I could do that. I told them about inferences.

MR. LAZARUS: But you didn't tell them the inference that they might view.

MR. CHREIN: Your Honor, one request that I would have in stating the elements of 1708 that it did not say the possession must be unlawful.

THE COURT: Sure, I repeated it. I repeated it five times.

MR. LAZARUS: I heard it.

THE COURT: Okay.

(Jury entered the courtroom.)

THE COURT: There are two requests that I will give you and the first is when I discussed the question of on or about a certain day as alleged in the indictment, of course, the on or about does not apply to March 23, it also applies to March 24th.

The second one is you may infer an

inference from any material fact, another inference.

In other words, you may infer from that material fact in the case an inference.

Now, in the case you may draw an inference that the possession was unlawful and you must do that from the evidence in the case.

In other words, you cannot draw an inference upon an inference and you can't speculate.

For example, if I have a glass of water on my bench, you may infer that if I tip over the glass the water will fall to the floor.

If I tip over the same glass, you cannot infer that there is another glass to catch it. It's as simple as all that.

All right.

Take them out.

The two alternates need not go into the jury deliberating room. Thank you very much for being with us and I hope you enjoyed yourselves.

(Marshals sworn.)

(Jury left courtroom at 4:43.)

MR. LAZARUS: I have all the exhibits right here.

THE COURT: Decide among yourselves and send them in. They are going to ask for them anyway.

MR. CHREIN: I would rather wait until they request them.

(Time noted at 4:45 P.M.)

(Time is now 9:30. Jury in the box.)

THE COURT: Be seated.

Mark this as an exhibit.

THE CLERK: Jury note marked as Court Exhibit No. 10.

(So marked.)

THE COURT: All right, now, I know that you sent the note to me, Madam Foreman, and ladies and gentlemen of the jury, for the testimony of Mr. Grinspan and for the testimony of Mr. Baker.

Now, we have a tremendous problem. The two stenographers that took that testimony are not with us tonight and unfortunately, the testimony was not transcribed, so that it could be read to you and this stenographer cannot read the transcription of a previous stenographer because each one uses their own symbols.

Rather than make an error in telling you what the questions and answers were, we'll have to delay a reading. I was hoping we wouldn't have to put this over to tomorrow morning, but there's no other way of doing it.

The only alternative is to send you out to a hotel, or else we have too many women jurors to send you home or else you can go home with the promise that you wouldn't discuss the case at home or with anyone else.

How many of you would rather be sent home than be put up in a hotel?

Now, let me ask you this question: What means do you have of getting home?

I realize you're all green people, unfortunately for you you're in my custody at this time.

JUROR NO. 8: Can I take a taxi?

THE COURT: The trouble is if you take a taxi, it's at your own expense.

JUROR NO. 2: I use the Long Island Railroad.

JUROR NO. 9: I go with the Long Island Railroad.

JUROR NO. 4: I go with the Long Island Railroad.

THE COURT: We can drop you off at the Long Island Railroad. The marshal has agreed to that. He can't drive anybody to Long Island. Would you rather go home than go to a hotel?

All right.

Then, let's see. You have the problem you need a taxi?

JUROR NO. 8: Yes.

THE COURT: You have to go out to Long Island?

JUROR NO. 8: Astoria, Long Island and the subway at night I don't travel.

THE COURT: I don't blame you. That's quite expensive taking a taxicab out to Astoria.

JUROR NO. 1: Well, I have to go to Canarsie.

THE COURT: That's expensive too. We don't like to place the onus of the expense upon you. You maybe saying to yourselves they pay for a hotel, why don't they pay for a taxi.

It doesn't work out that way. There's a provision for one and not for the other.

I'll have to discharge you on the promise that you not discuss this case at home, because you can only be fair in your deliberations in keeping a very open mind.

My general policy is never to send a jury home until they have completed their deliberations. This has been my policy. I usually keep them until 4 or 5 o'clock in the morning, if it's necessary.

You people are either fortunate or unfortunate that we don't have the stenographers.'

All right.

Is there any objection?

MR. CHREIN: Can we have one further request that they do not discuss it among themselves?

THE COURT: They know that.

Don't discuss the case among yourselves and be here tomorrow morning at 9:30 -- if there was somebody here at 9 o'clock?

THE MARSHAL: If we need to be, we'll be here.

THE COURT: Can you be here at 9 o'clock?

THE MARSHAL: We'll have to be here.

THE COURT: If you can get here 9 o'clock tomorrow morning, it will be better for us and by 10 o'clock -- no, we wouldn't have the stenographers here, and so that wouldn't be any good.

Get here at 9:30 and we'll have the stenographers here and we'll get that testimony read to you immediately.

JUROR NO. 9: I had sent a slip of paper to call home. Did somabody call for me?

JUROR NO. 8: About the car at the railroad station?

THE COURT: Yes.

All right. He'll call home. You want to find out if the car is still there? We'll call right now.

You want to go in chambers and call right now? You can call yourself from my chambers.

Take the ones to the Long Island Railroad by van and we'll call a cab for you here.

(Jury left courtroom at 9:37.)

THE COURT: What else?

MR. LAZARUS: Two brief matters, your

Honor. The evidence which is all Government evidence is in the jury room.

THE COURT: We're going to get it out.

MR. LAZARUS: The second is -- I would rather wait until the jury leaves.

THE COURT: What's that?

MR. LAZARUS: Heyward Martin is lodged in West Street and we have not sent 475's, because we had no idea that it was going to go over to tomorrow. Perhaps a direction to the marshal?

THE COURT: Somebody has to return him there. We can't keep him here. We have a prisoner that has to go back to WEst Street. They will take him back to West Street.

Very good.

Good night.

(Time noted: 9:39)

* * * * * * * * * *

Arthur W. Marcus
Official Court Reporter
U.S. District Court
Eastern District of N.Y.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

72 CR 393

HEYWARD MARTIN,

Defendant.

----------X

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ NOV 9 1972 ★
TIME A.M.
P.M.

United States Courthouse,
225 Cadman Plaza East,
Brooklyn, New York

August 15, 1972,
11 o'clock, a.m.

B E F O R E :

HON. MARK A COSTANTINO,

U. S. D. J.

I HEREBY CERTIFY THAT THE WITHIN COPY IS A TRUE AND ACCURATE TRANSCRIPT OF MY STENOGRAPHIC NOTES TAKEN AT SUCH PROCEEDING.

Leo Rashkin
OFFICIAL COURT REPORTER

ACR

LEO RASHKIN

ACTING OFFICIAL COURT REPORTER

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A P P E A R A N C E S :

ROBERT A. MORSE, ESQ.,
UNITED STATES ATTORNEY FOR THE EASTERN
DISTRICT OF NEW YORK,

BY: JOAN O'BRIEN, ESQ., of Counsel.

JOHN C. CORBETT, ESQ.,
ATTORNEY FOR DEFENDANT.

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P R O C E E D I N G S:

THE CLERK: For sentencing Heyward Martin.

MR. CORBETT: I don't know whether Your Honor recalls but, at the trial, I reserved motions with respect to the verdict of the jury until today.

I move to set aside the verdict on the ground it is not established by the weight of the credible evidence.

THE COURT: Denied.

MR. CORBETT: I have a second motion, Judge.

When the jury returned its verdict, I requested it be polled. I am sure, Your Honor, recalls I had a problem with Juror No. 5. The record will show that when questioned as to her verdict, she showed a great deal of indecision, looked around, and you proceeded to prompt her to tell her verdict.

The lady became more confused and, as a matter of fact, simultaneously with my request to you, you also requested the jury stop prompting her, and tell her verdict.

MR. CORBETT: (Continuing) She waited a while, looked at the defendant and said: "I go along," or words to that effect. She was then asked if she found him guilty and it shows it was not a unanimous verdict.

THE COURT: Not to me. It shows she might have been nervous. I wouldn't know what had been wrong with her. They go into that in the jury room. No problem.

MR. CORBETT: That is fine, but the jury verdict was not unanimous.

THE COURT: I denied that motion. I see no reason for setting aside the verdict.

Are you ready for sentencing?

MR. CORBETT: Yes.

THE COURT: Will you understand the sentence is absolutely mandatory, so that anything you say, you may say it, but your client has a right to say anything he wishes to.

MR. CORBETT: I have one thing to say. I have filed a notice of appeal today and, under those circumstances, will Your

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Honor consider putting this defendant on bail pending appeal?

THE COURT: No.

MR. CORBETT: In view of the fact this is a mandatory sentence then, the defendant is ready.

THE COURT: Then the Court sentences you to 25 years on the First Count and 10 years on the Second Count, both concurrently.

MISS O'BRIEN: The Second Count is 1708, Your Honor?

THE COURT: The Second Count is 1704.

MISS O'BRIEN: Fine. I was confused. Your Honor, 1708?

THE COURT: No. 1704 of Z114, First and Second.

MISS O'BRIEN: And the Second one is 1708?

THE COURT: Yes.

MISS O'BRIEN: Which, I believe, is 5 years.

THE COURT: No, 10 years. Five-thousand dollars or 10 years.

MISS O'BRIEN: 1708, Your Honor?

MISS O'BRIEN: (Continuing) I believe it is 5.

THE COURT: Well, let's see.

MISS O'BRIEN: $2,000 or 5 years, Your Honor, on 1708.

THE COURT: 1708 is $2,000 or 5 years.

THE CLERK: In other words, Your Honor, 25 years on Count 1, 5 years on Count 2, sentences to run concurrently?

THE COURT: Right.

MISS O'BRIEN: Thank you, Your Honor.

* * *

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

HEYWARD MARTIN,

PETITIONER,

- VS -

UNITED STATES OF AMERICA,

RESPONDENT.

Copy

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MOTION TO PROCEED IN FORMA PAUPERIS

Comes the petitioner, HEYWARD MARTIN, and moves this Court pursuant to Title 28, U.S.C., Section 1915, for permission to proceed in forma pauperis in filing the attached Motion 2255, Title 28, U.S.C.

An Affidavit in support of this motion is attached hereto.

Heyward Martin

HEYWARD MARTIN
Petitioner, Pro se

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

COSTANTINO, J.

HEYWARD MARTIN,

PETITIONER

- VS -

UNITED STATES OF AMERICA,

RESPONDENT.

AFFIDAVIT IN FORMA PAUPERIS

I, HEYWARD MARTIN, depose and say that I am the petitioner in the above entitled proceedings.

That I am unable to pay the cost of said proceedings or to give security therefor.

That I believe I am entitled to redress and that the nature of action is briefly stated as follows: MOTION FOR RE-SENTENCE.

I declare under the penalties of perjury that the foregoing affidavit is true and correct to the best of my knowledge and belief.

HEYWARD MARTIN
Petitioner, Pro se

This is to certify that the above named inmate has a trust fund balance of $ .19 , he (does) (does not) own any property not listed below.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 5th DAY OF March , 1975.

(CASE WORKER)

July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

HEYWARD MARTIN, PETITIONER, - VS - UNITED STATES OF AMERICA, RESPONDENT.	MOTION UNDER TITLE 28 U.S.C. § 2255

MOTION FOR RE-SENTENCE

MOTION FOR CORRECTION OF SENTENCE

Comes now HEYWARD MARTIN, the petitioner in the above styled cause, in proper person, and in forma pauperis, and moves this Honorable Court under Title 28 U.S.C., § 2255 for relief on the above stated motions.

STATEMENT OF CASE FACTS

On August 15, 1972, the Court sentenced petitioner to the twenty-five (25) year term mandated by 18 U.S.C., § 2114, Armed Robbery of a Postal Facility, and five (5) years for possession of Stolen Mail (18 U.S.C., § 1708), to be served concurrently.

By letter dated March 19, 1973, Counsel of Appeal, John C. Corbett, J.D., advised petitioner that the Circuit Court of Appeals for the Second Circuit on March 15, 1973, affirmed the conviction. Mr. Corbett's office address is listed as 66 Court Street, Brooklyn, New York 11201.

By letter dated June 7, 1973, James H. Blondell, Assistant, Office of the Clerk, Supreme Court of the United States, advised petitioner that the filing time for a Petition for Certiorari had expired and that no extension

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

HEYWARD MARTIN,

PETITIONER,

- VS -

UNITED STATES OF AMERICA,

RESPONDENT.

MOTION UNDER TITLE 28 U.S.C. § 2255

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By letter dated June 7, 1973, James N. Blondell, Assistant, Office of the Clerk, Supreme Court of the United States, advised petitioner that the filing time for a Petition for Certiorari had expired and that no extension

for filing would be granted, Rule 34(2) of the Rules of the Court.

On the 7th day of August, 1973, this Honorable Court reviewed the sentence heretofore imposed under Rule 35, Federal Rules of Criminal Procedure, and the Court amended the original sentence by adding its recommendation to the Parole Board for parole after five (5) years of the sentence has been served.

No other collateral attacks are pending in United States Courts of Law, nor has the issues herein raised been presented by motion for a Court's consideration by the petitioner/defendant.

MOTION FOR RE-SENTENCE

Comes now the petitioner, HEYWARD MARTIN, and moves this Court by motion for re-sentence for the reasons as follows:

Petitioner requests that the sentence imposed be vacated and he be re-sentenced on the grounds that contrary to Rule 32(a) of the Federal Rules of Criminal Procedure, he had been afforded no opportunity to make a statement on his own behalf either at the time of the original sentence imposed on the 15th day of August, 1972, or when the sentence was amended by Memorandum and Order filed on the 7th day of August, 1973, adding a recommendation of parole after five (5) years of servitude of sentence.

GROUNDS FOR GRANTING MOTION FOR RE-SENTENCE

Rule 32(a) of the Federal Rules of Criminal Procedure provides in pertinent part, as follows:

> "Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment."

In the instant case the colloguy of the sentencing transcript, hereinafter designated as (S.T.), and which is attached to this petition

and marked as Exhibit "A", reflects that the defendant/petitioner was not granted the right of allocution.

The showing on the face of the sentencing record reveals the Court's statement to counsel that petitioner had a right to speak.

(S.T. page 4) THE COURT:

> "Will you understand the sentence is absolutely mandatory, so that anything you say, you may say it, but your client has a right to say anything he wishes to."

The colloguy of the sentencing record indicates that the Court was conscious that the defendant had a right to speak on his own behalf. The record fails to disclose that an opportunity was provided for petitioner to speak or that the Court addressed the defendant personally and asked him if he wished to make a statement on his own behalf as mandated by Rule 32(a) of the Federal Rules of Criminal Procedure.

The sentencing court spoke only to counsel and the record reveals no allocution by counsel on petitioner's behalf. The only statement by counsel was that defendant was ready for sentencing.

(S.T. page 5) MR. CORBETT:

> "In view of the fact that this is a mandatory sentence then the defendant is ready."

The record in the instant case conclusively shows that petitioner is entitled to have his sentence vacated and that he be brought within the jurisdiction of the court for the purpose of being provided a opportunity to exercise his right to make a statement on his own behalf and that this Honorable Court will be provided a second round to re-sentence petitioner to a judgment under conditions which the court deems appropriate.

MOTION FOR CORRECTION OF SENTENCE

The sentencing court erroneously believed that there was no discretion but to enter the straight mandatory sentence of twenty-five (25) years imprisonment

under 18 U.S.C., § 2114.

On the 4th day of April, 1972, petitioner HEYWARD MARTIN was arraigned on Indictment No. 72CR393, a two count indictment in which part of the first count charged: HEYWARD MARTIN, also known as "SKEETS" placed the lives of the custodians of said United States Mail and said property of the United States in jeopardy by the use of a dangerous weapon, to wit: a shotgun. Title 18 U.S.C., § 2114.

SECTION 2114: MAIL, MONEY, OR OTHER PROPERTY OF THE UNITED STATES:

Whoever assaults any person having lawful charge, control, or custody of any mail, matter, or of any money or other property of the United States, with intent to rob, steal, or purloin such mail, matter, money, or other property of the United States, or robs any such person of mail, matter, or of any money, or other property of the United States shall, for the first offense, be imprisoned not more than ten (10) years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five (25) years.

GROUNDS FOR CORRECTION OF SENTENCE

Petitioner contends the statute is not authoritative. Construction of an existing statute is a task for the Courts and not for Legislative Committees. Petitioner contends that there were sentencing alternatives available to the court which were applicable in the court's determination of punishment under the second phase of 18 U.S.C., § 2114, as held in the tenor of law of UNITED STATES v. DONAVAN, 242 F.2d 61 (2nd Cir. 1957): "The Court held petitioner could have been placed on probation."

In SMITH v. UNITED STATES, 284 F.2d 789 (5th Cir. 1960): "The Court held a defendant could receive a suspended sentence."

Petitioner contends that the provisions of 18 U.S.C., § 4208(a)(2) are applicable to the mandatory provision of 18 U.S.C., § 2114. See JONES v. UNITED STATES, 419 F.2d 593 (8th Cir. 1969), or that a sentence imposed under the statute may be provided with a recommendation for parole after a specific servance of sentence, UNITED STATES v. HEYWARD MARTIN, United States District Court, Eastern District of New York, 72CR393, Order, August 7, 1973.

In summary, the United States Court of Appeals for the Eighth Circuit, in JONES v. UNITED STATES, supra, held: (page 599)

> "We hold that the term 'mandatory penalty' in Section 7 of the 1958 Act means a sentence which must be served devoid of the benefits of suspension, probation, and parole. Illustrative of this are the sentences for the Narcotic offenses described in Section 7237(d). We further hold that a 25 year sentence imposed pursuant to the last part of Section 2114 is not a mandatory penalty within the meaning of Section 7 of the 1958 Act."

Petitioner contends that the sentencing court could have exercised its discretionary power and reach beyond the body of the indictment and the language of 18 U.S.C., § 2114, when determining the punishment to be imposed. This contention is supported by the tenor of law held in ANDREWS v. UNITED STATES, 373 U.S. 334, 340, 83 S.Ct. 1236, 10 L.Ed. 2d 383 (1963).

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The Supreme Court in ANDREWS v. UNITED STATES, supra, seemed to take a broad view of the choices open to the trial court when a defendant is convicted of a violation of the last phase of Section 2114.

> "The District Court may, as before, sentence the petitioners to same 25 years imprisonment; it may place one or both of them on probation; it may make some other disposition with respect to their sentences." 373 U.S. at 340, 83 S.Ct. at 1240. (emphasis added)

Petitioner contends that 18 U.S.C., § 2114, is a statute which has roots back to 1799. It is a two phase statute which by its structure holds two distinct provisions for punishment. It is a continuous statute that defines

a series of acts which are bound by numerous conjunctives of "and", "or", connecting both the meaning and the construction of the elements of the acts which would control the sentencing provision of the statute.

In that Section 2114 is a continuous statute, the pivotal factor directing the court to a sentencing provision would be gleam after a final review by the court on the factual mechanics inherent in the commission of the offense and the substance of the elements of the offense.

The element of assault is present in both phases of the statute. In the second phase the element is clearly outlined by the legislative language, "if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or for a subsequent offense, shall be imprisoned for twenty-five years."

However, the legislative intent as to the sentencing provisions to be employed becomes vague on the element of assault in that this element is clearly shown to exist in substance by the statute language of both phases of the statute, but is not defined as to degree of assault which is shown as follows:

First phase: Whoever assaults any person having lawful charge, control or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal or purloin such mail, money, or other property of the United States, or robs any such person of mail, matter or of any money or other property of the United States shall, for the first offense, be imprisoned not more than ten years.

It is noted that the sentencing provision of this phase of the statute is not mandatory outside of the amount of time which could be imposed.

Second phase: The element of assault is inherent in the structure language of "or puts his life in jeopardy by the use of a dangerous weapon". This element of assault is sandwiched between the acts of "wounds the person" and "or for a subsequent offense." This grammatical arrangement would seem that the legislative intent on applying the mandatory twenty-five year sentence

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A 101

relied on related acts of similar import as wounding or injuring a postal employee during an armed robbery of a postal facility.

It is held in law that the grand central light of legislative intent is the formation of the language of a statute. Construction of an existing statute is a task for the courts and not for legislative committees. Mr. Chief Justice Marshal long ago observed that "a mistaken opinion of the legislature concerning the law, does not make law." See 419 F.2d 598.

In the instant case no postal employee was "wounded", nor is the conviction in the category of "or for a subsequent offense", for the Pre-Sentence Report ordered by the Court would show that petitioner/defendant has no prior felony record. However, the element of assault was established by witnesses testimony that a shotgun was held by the robber identified by the postal employees as petitioner/defendant and though no weapon of a shotgun variety was produced at trial, the testimony of the witnesses was sufficient for the Court to charge the jury on "dangerous weapon".

Court's charge:

> "Now a dangerous weapon includes anything operated or wielded or otherwise used by one or more persons to inflict severe bodily harm or injury upon another person.
>
> So an operable firearm such as a pistol or gun capable of firing a bullet or ammunition may be found to be a dangerous weapon.
>
> Now, to put in jeopardy, of course, goes without saying that by use of that weapon you expose a person to fear of his life or to a risk of death.
>
> Now, in this case, you may infer a gun used during a robbery was loaded, in the absence of direct proof that the chambers contained bullets."

Petitioner cites the above excerpt of the Court's charge not as a challenge of its sufficiency, but as an illustration that the direct proof introduced during the trial and coupled with the Court's charge would be sufficient for a jury finding to the counts of the indictment, but would be insufficient as a basis to support application of sentencing provisions held in the second phrase of 18 U.S.C., § 2114, for the reasons as follows:

A 102

Petitioner contends that a deadly weapon is distinguished from a dangerous weapon and the latter is often one of fact for the jury, but not infrequently one of law for the court. The manner of use enters into consideration as well as other circumstances.

In UNITED STATES v. EDWARD WAYNE BEVERLEY, 416 F.2d 263 (1969), page 264 - MERRILL, Circuit Judge:

> "We agree that the aggravated form of robbery described in the latter part of Section 2114, as putting life in jeopardy by use of a dangerous weapon means more than a 'mere holdup by force and fear'. It must be a holdup involving the use of a dangerous weapon actually so used during the robbery and the life of the person being robbed is placed in an objective state of danger."

It should be noted that Edward Wayne Beverley was in part charged in the indictment, to wit: a loaded .357 magnum derringer-style pistol.

In the instant case petitioner was charged in the indictment, to wit: a shotgun. The testimony of the witnesses was sufficient to allow the jury to make a finding as to the face of the indictment. However, the absence of direct proof of the shotgun as evidence during the course of trial causes a separate test of proof that the chain of events during the offense was more than a mere holdup by force and fear, which would sustain the question of law inherent in the application of the sentencing aspects in the latter part of Section 2114.

The area in which this determination could be made would seem to be found through the testimony of the postal employees who were present when the offense was committed.

The trial testimony on the respective state of mind of the witnesses in the context of "life in jeopardy by the use of a dangerous weapon" is attached to this petition and marked as Exhibits "B", "C", "D" & "E", and is designated as (T.M.) hereinafter in a summary style.

Witness John Carter testified that he had never been present during a armed robbery before the occurance of this case and when examined about his

state of mind during the event, his response was:

> "No, a little scared. I wouldn't say I was exactly calm." (T.M.) page 28.

Witness John Conley testified that:

> "When I opened the rear post office door a postal worker tried to squeeze past me. The guy had a postal jacket and a carrier's sack. He took something out of the sack, I thought it was a stick. I grabbed it and he pulled it back. It was a shotgun." (T.M. page 40)

Though Mr. Conley had this type of contact with one of the robbers the record is barren as to his state of mind.

Witness Ruben Carter testified that a man approached him with a shotgun and said he wanted money. I showed him where the money was. (T.M. page 49) When I couldn't get the safe open the first time he said, "I know where you live....you have a little girl.....you better open the safe." But I just couldn't get it open. Then he asked for the money orders. (T.M. page 50) I said, "they are locked up there in that little cabinet." He said, "you better open that cabinet if you know what's good for you." I opened the cabinet and gave him the supply of money orders.

(T.M. page 52) "The first thing I knew there was a man there with a shotgun and he said, 'just take it easy, nobody needs to get hurt'".

He said "come over here", indicating towards the vault.

(T.M. page 73) I was scared.

(T.M. page 75) I know that the clerk, Carter, and the truckdriver, Conley, had gone to load the truck which is normal. Then I saw Carter and Conley walking back in front of me almost, and before I could say anything like "John, what's happening", the defendant was just about that direction from me and he said, "take it easy, nobody needs to get hurt."

(T.M. page 78) Witness Christianne Jones testified that a young man dressed as a carrier approached her as she was standing talking with the super-

visor. He had a carrier's jacket and a bag, a carrier's bag. Then I looked at somebody that was standing on the side of him. As I looked at the second person I realized the other person had a shotgun and I looked back down at it.

The record is barren of Christianne Jones state of mind. However, when Jones was present at a identification line-up, she stated: "that No. 5 looks like him, but I can't be sure." Because she thought the men in the line-up could hear, even though they couldn't see, she guessed her doubtful identification was because she was a little frightened. (T.H. page 82.)

The excerpts of the witnesses testimony shows that the man with the shotgun made threats against Ruben Carter after making a initial statement "that nobody need get hurt". A full reading of the witnesses combined testimony shows that the man with the shotgun was not pointing, wielding or brandishing the weapon in a menacing manner. The shotgunner, by the testimony of trial witnesses, was the person fulfilling the act of securing the money and money orders. The other bandit with the pistol kept the postal employees under his direct control, and in the sense by doing so, placed them in jeopardy.

CONCLUSION

Petitioner/defendant understands that a shotgun per se is a dangerous weapon but as the manner of use entered into consideration, as well as other circumstances, as a element to be proven under 18 U.S.C.A., it becomes compounded question that is one of fact for the jury and one of law for the court. There is no conflict by this separation of fact as one determines a verdict and the other determines punishment.

The use of a dangerous weapon incorporates the element "assault". In the first part of the statute, the element "assault" is defined by word usage and in the latter part of the statute the element "assault" is mandated by the language structure of acts which warrant the application of the mandatory sentence provision.

A 105

The grand central light of legislative intent is the language of a statute. The United States Court of Appeals for the Ninth Circuit has held:

> "That the aggravated form of robbery described in the latter part of Section 2114 as putting 'life in jeopardy by use of a dangerous weapon' means more than a mere holdup by force and fear. It must be a holdup involving the use of a dangerous weapon actually so used during the robbery that the life of the person being robbed is placed in an objective state of danger."
> WAGNER v. UNITED STATES, 264 F.2d 524, 530 (9th Cir. 1959).

In ANDREWS v. UNITED STATES, 373 U.S. 334, 340, 83 S.Ct. 1236, 10 L.Ed 2d 383 (1963), the Supreme Court took a broad view of the choices open to the trial court when a defendant is convicted of a violation of the last phrase of Section 2114.

> "The District Court may, as before, sentence the petitioners to the same 25 years imprisonment; it may place one or both of them on probation; it may make some other disposition with respect to their sentences." (emphasis added)

The broad view of sentencing alternatives open to the trial court when a defendant is convicted under the last phrase of Section 2114 is clearly shown in ANDREWS v. U. S., supra, "it may make some other disposition with respect to their sentence."

Even if the statutory sentence was mandatory, it is still the exclusive province of the trial court to pronounce it.

In JOHN ALBERT BRAXTON v. UNITED STATES, 74-1234-CIV. JE. United States District Court for the Southern District of Florida, November 26, 1974, and in UNITED STATES v. FRANK RIZZO, Criminal indictment CR-1376, re-sentenced January 3, 1975, United States District Court for the Southern District of Florida, Brunswick Division, re-sentencing of the defendants under the armed robbery phrase of Section 2114, the trial courts took a fresh approach by exercising the discretionary power which the Supreme Court outlined as the exclusive province of the court to make some other disposition with respect

to the latter sentencing provision of 18 U.S.C., § 2114.

Petitioner is conscious that the above District Court's decisions lack control in their application but they are submitted for this Honorable Court's consideration.

WHEREFORE, petitioner prays that the relief sought in this application under Title 28 U.S.C., § 2255, be granted and that this Honorable Court ORDER that petitioner be brought back within the jurisdiction of the Court for re-sentencing and for any further relief the Court deems would be in the interest of justice.

Respectfully submitted:

Heyward Martin

HEYWARD MARTIN
BOX P.M.B. 75217
ATLANTA, GEORGIA 30315

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 3 DAY OF March, 1975.

J B Dukes
(CASE PARKER)

Parole Officer Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

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A 109

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HEYWARD MARTIN

v.

UNITED STATES OF AMERICA

73-C-268

MEMORANDUM and ORDER

MAR 20 1973

Heyward Martin, pro se

COSTANTINO, D.J.

This is a motion pursuant to 28 U.S.C. § 2255 to correct the sentence which petitioner received on August 15, 1972. On that day, he was sentenced to a term of 25 years for post office robbery in violation of 18 U.S.C. § 2114 and to a term of 5 years for possession of stolen mail in violation of 18 U.S.C. § 1708, the terms to run concurrently. He had earlier been found guilty by a jury.

In an opinion dated August 7, 1973 this court recommended parole after service of five years of the sentence.

Petitioner incorrectly states that he was denied an opportunity to speak on his own behalf prior to sentencing. The court clearly provided this opportunity.

"Your client has a right to say anything he wishes to." (Transcript of Sentencing, August 15, 1972 at 4)

The fact that the court called the twenty-five year sentence "mandatory" rather than expressly stating that it could suspend sentence or place defendant on probation in no way denied petitioner an opportunity to speak. Indeed, petitioner's counsel could, if he had chosen to do so, have argued that a suspended sentence or probation was appropriate. Where neither petitioner nor his counsel chose to make this argument before the court at the appropriate time, petitioner cannot now complain that he was denied an opportunity to speak.

Petitioner urges a number of other grounds in support of his motion, none of which has any validity. Accordingly, the motion is denied in all respects.

U. S. D. J.

A 109

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

HEYWARD MARTIN, PETITIONER, - vs - UNITED STATES OF AMERICA, RESPONDENT.	NO. 75 - C- 365

MOTION FOR RECONSIDERATION

Comes now your petitioner/defendant, HEYWARD MARTIN, respectfully petitioning this Honorable Court for a MOTION FOR RECONSIDERATION on the issues presented to the Court by Motion For Resentence and Motion For Correction Of Sentence, pursuant to Title 28 U.S.C., § 2255, filed on the 3rd day of March 1975, and denied by Memorandum and Order filed on the 20th day of March 1975, and notice of the Court's decision received by petitioner on the 3rd day of April, 1975.

ARGUMENT FOR RECONSIDERATION

In 1964, the Advisory Committee on Criminal Rules proposed an amendment so that the Rule, as to allocutus, would read as follows - Rule 32 (a)(1) - third sentence:

> "Before imposing sentence the Court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment."

This amendment was, in 1966, promulgated by the Supreme Court and became effective July 1, 1966.

The amendment writes into the rule the recent holdings that the court, before imposing sentence, must afford an opportunity to the defendant personally to speak in his own behalf. It also provides an opportunity for counsel to speak on behalf of the defendant. - Orfield - Criminal Procedure under the Federal Rules - 32:10, page 191.

The record of sentencing submitted as Exhibit "A" and attached to Motion for Resentencing filed on March 3, 1975, shows as follows:

> "Your client has a right to say anything he wishes to."
> (Transcript of sentencing - Aug. 15, 1972 - at 4)

The above was addressed to defendant's counsel and as such does not satisfy the rule. There is nowhere showing on the face of the record that the court advised the defendant that he, as well as counsel, has this right to allocutus.

The record is barren of any conduct by the court addressing the defendant personally and asking him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

The sentencing transcript reflects counsel's state of mind after the court provided an opportunity for counsel to make a statement on behalf of his client.

(MR. CORBETT: "In view of the fact this is a mandatory sentence, then the defendant is ready." page 5).

The sentencing transcript promotes a set of aggravating circumstances that is not alleviated by the proposition that petitioner's counsel could, if he had chosen to do so, have argued that a suspended sentence or probation was appropriate. The record is void on counsel's knowledge as to the interpretation of the mandatory sentencing provision of Section 2114, Title 18 U.S.C.

An Evidentiary Hearing would be required to determine counsel's state of mind at the time of sentencing. A defendant has a right to present information in mitigation of punishment.

A 111

A lawyer has a right to speak on behalf of his client by presenting information in mitigation of punishment and the court has a duty to listen to and give such information serious consideration.

If the above opportunities are lost through misinterpretation of a mandatory sentencing provision, as the sentencing transcript in the instant case reflects, would it not be in the interest and concept of American Justice to order a resentencing?

WHEREFORE, petitioner prays that the relief sought in this application for reconsideration be granted and that this Honorable Court order that petitioner be brought back within the jurisdiction of the court for resentencing and for any further relief the court deems would be in the interest of justice.

Respectfully submitted,

Heyward Martin

Heyward Martin
Box P.M.B. 75217
Atlanta, Georgia 30315

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 4th DAY OF APRIL, 1975.

(CASEWORKER)

A112

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

HEYWARD MARTIN,

PETITIONER,

- VS -

UNITED STATES OF AMERICA,

RESPONDENT.

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now the petitioner, HEYWARD MARTIN, and moves this Court pursuant to Title 28 U.S.C., Section 1915, for permission to proceed in forma pauperis in filing the attached MOTION FOR RECONSIDERATION.

An Affidavit in support of this motion is attached hereto.

Heyward Martin

HEYWARD MARTIN
BOX P.M.B. 75217
ATLANTA, GEORGIA 30315

A113

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

HEYWARD MARTIN,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

AFFIDAVIT IN FORMA PAUPERIS

I, HEYWARD MARTIN, depose and say that I am the petitioner in the above entitled proceedings;

That I am unable to pay the cost of said proceedings or to give security therefor;

That I believe I am entitled to redress and that the nature of my action is briefly stated as follows: MOTION FOR RECONSIDERATION.

I declare under the penalties of perjury that the foregoing affidavit is true and correct to the best of my knowledge and belief.

Heyward Martin
HEYWARD MARTIN
Petitioner, Pro se

This is to certify that the above named inmate has a trust fund balance of $ 1.25 , he (does) (does not) own any property not listed below.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 4th DAY OF APRIL, 1975.

(CASH. CLERK)

Form [illegible] Pursuant to the Act of July [illegible] to Administer Oaths (18 U.S.C. 4004).

A 114

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

HEYWARD MARTIN,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that he is the petitioner/defendant in the above entitled action.

That on the ____ day of April, 1975, he served a copy of the attached MOTION FOR RECONSIDERATION by placing same copy in a postpaid envelope addressed to the persons hereinafter named, at the places and addresses stated below, by placing said envelopes and contents in the United States Mail at the United States Penitentiary, Atlanta, Georgia.

TO: UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK 11201

TO: UNITED STATES ATTORNEYS OFFICE
UNITED STATES DISTRICT COURT
BROOKLYN, NEW YORK 11201

Heyward Martin
HEYWARD MARTIN
BOX U.S.P. 75217
ATLANTA, GEORGIA 30315

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 4th DAY OF APRIL, 1975.

(U.S. NOTARY)

Parole Clerk Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

A115

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HEYWARD MARTIN — 75-C-365

-v- — MEMORANDUM and ORDER

UNITED STATES OF AMERICA

APR 24 1975

Heyward Martin, pro se

COSTANTINO, D.J.

This is a motion for reconsideration of the denial of petitioner's motion to correct his sentence pursuant to 28 U.S.C. § 2255. Most of the grounds raised in this motion were dealt with in this court's Memorandum and Decision dated March 20, 1975 which denied petitioner's original § 2255 motion.

One issue raised by this motion for reconsideration deserves further comment. Petitioner contends that his sentence should be vacated because the court did not ask him personally whether he had anything to say on his own behalf prior to sentencing in alleged violation of Rule 32(a), Fed.R.Crim.P. In Hill v. United States, 368 U.S. 424, 428

(1962), the Court held that the failure of a trial court to ask a defendant whether he has anything to say before sentence is imposed is not an error of the character or magnitude cognizable under a writ of habeas corpus. The Court more recently made it clear that collateral relief is not available when all that is shown is non-compliance with the formal requirements of Rule 32(a) in the absence of any indication that petitioner was prejudiced by the asserted technical error. Davis v. United States, 417 U.S. 333, 346 (1974). Here, failure to address petitioner personally was at most a technical non-compliance with Rule 32(a) since it was clearly stated by this court that petitioner had a right to speak in his own behalf and since petitioner was given an opportunity to speak in his own behalf. The court stated:

> "Your client has a right to say anything he wishes." (Sentencing Transcript dated August 15, 1972 at 4)

In view of the foregoing, there is no merit to the argument that petitioner was prejudiced by the fact that he was not addressed personally. This court complied with the requirement stated in Green v. United States, 365 U.S. 301, 305

A117

(1961), one of the two decisions, along with Hill v. United States, supra, on which Rule 32(a) was based. Notes of Advisory Committee on Rules, 18 U.S.C.A. Rule 32(a), Fed.R.Crim.P.; Supplementary Pamphlet 1961-1970. This requirement is that "trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing." Accordingly, the motion for reconsideration is denied.

U. S. D. J.

A 118

72/706
C.A. 2-15-72
Ltr. from AUSA
Ferguson

PRO 53
75-[illegible]
2/25/75

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 3rd day of September, one thousand nine hundred and seventy-five.

D.C. #750568
Lf

Heyward Martin,

Appellant,

v.

United States of America,

Appellee.

A motion having been made herein by Appellant pro se for leave to proceed in forma pauperis, and for the assignment of counsel

Upon consideration thereof, it is

Ordered that the case be remanded for a hearing on appellant's sentencing and jury-charge issues. The motions for leave to proceed in forma pauperis and for assignment of counsel are hereby denied as moot.

William Hughes Mulligan

James L. Oakes

Murray I. Gurfein Circuit Judges

WHM JLO MIG

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A 119

Copy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

HEYWARD MARTIN,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

- - - - - - - - - - - - - - - - - - - X

75 C 365
(on remand from the United States Court of Appeals for the Second Circuit)

GOVERNMENT'S MEMORANDUM OF LAW

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Alvin A Schall
Assistant U.S. Attorney
(Of Counsel)

A120

PRELIMINARY STATEMENT

Petitioner is presently incarcerated in the Federal Penitentiary in Atlanta, Georgia, serving a 25 year sentence, following his conviction in the United States District Court for the Eastern District of New York (Costantino, J.), on August 15, 1972, of armed robbery of a post office, in violation of T. 18, U.S.C., §2114. Petitioner was also convicted of unlawful possession of stolen mail, in violation of Title 18, United States Code, §1708. For this offense, he was given a five year sentence, to run concurrently with the sentence imposed by Judge Costantino under §2114. Petitioner's conviction was affirmed by the United States Court of Appeals for the Second Circuit, without opinion, on March 15, 1973.

In March of 1975, petitioner moved pro se in the District Court, pursuant to T. 28, U.S.C., §2255, for an order to correct his sentence. In support of his motion, petitioner alleged that he had been denied an opportunity to speak in his own behalf at the time of sentencing. See Rule 32(a) of the Federal Rules of Criminal Procedure. Petitioner also appeared to claim that he had been improperly sentenced because Judge

A 121

Costantino and petiitoner's counsel allegedly failed to understand that when sentencing petitioner under §2114, the Court had the option of placing petitioner on probation. In a Memorandum and Order filed March 26, 1975 Judge Costantino denied petitioner's motion, pointing out that petitioner had in fact been given an opportunity to speak in his own behalf at sentencing and noting that the Court had understood the sentencing requirements and options under T. 18, U.S.C., §2114.

Following the denial of his motion, petitioner submitted a pro se motion for reconsideration in the District Court, again alleging the same two grounds upon which he had relied in his original petition. This motion was denied by Judge Costantino in a Memorandum and Order filed April 24, 1975.

After the denial by Judge Costantino of his motion for reconsideration, petitioner appealed pro se to the Court of Appeals, asking for leave to proceed in forma pauperis and for the appointment of counsel. In his appeal, petitioner relied upon the same claims which he had asserted in the District Court. 1/

1/ Indeed, it should be noted that at no point in the course of the 2255 proceedings has petitioner sought any relief other than to be resentenced.

A 122

On September 3, 1975, the Court of Appeals ordered that petitioner's case be remanded to the District Court "for a hearing on appellant's sentencing and jury charge issues." At the same time, petitioner's motion for leave to proceed in forma pauperis and for the appointment of counsel was denied as moot. A copy of the order of the Court of Appeals, which was unaccompanied by any opinion, is annexed hereto as Appendix A.

In response to the request of the District Court, the Government is submitting this memorandum of law in connection with the remand of petitioner's case by the Court of Appeals.[2/]

2/ We are somewhat at a loss to understand the procedural context of the Court of Appeals' order remanding this case. Although there was an appeal pending before the Court the remand was solely in the context of the petitioner's application to proceed in forma pauperis. Accordingly, the order of the Court of Appeals was made wholly without the benefit of an adversary process. In effect, then, the Court of Appeals has acted on its own in this proceeding.

A123

STATEMENT OF FACTS [3/]

At 5:55 P.M., on March 23, 1972, John Conley, a motor vehicle operator employed by the Post Office, and John Carter, a dispatch clerk at the Rochdale Village Postal Station, opened the rear door of the Rochdale Village Postal Station to transport parcels of mail to Conley's waiting truck. An individual subsequently identified as petitioner, wearing a letter carrier's Eisenhower jacket and carrying a letter carrier's sack, attempted to squeeze by Conley and Carter. He withdrew a sawed-off shotgun from the sack he was carrying and forced both men into the interior of the well lighted post office. A second male individual, unidentified, wielding a .38 caliber pistol, entered behind petitioner. Both intruders then escorted the two postal employees to the front

3/ References in parentheses are to the trial transcript. All pages of this transcript reporting sessions of trial where evidence was presented are numbered in order. Thus, the sequentially numbered transcript pages report the Court proceedings of June 15, and 16, 1972, and the proceedings held on the afternoon of Monday, June 19, 1972.

A124

of the post office work area, behind the public service counter, where Conley and Carter were forced to lie face down and their hands and feet were tied behind their backs (R. 14-15a, 38-40).

The robbers next encountered Christianna Jones, a clerical worker, and the station superintendent, Reuben Carter. Mrs. Jones was herded, at gun point, by the unidentified robber to the locale of Conley and John Carter, where she too was made to lie down and was bound (R. 77-78).

Reuben Carter, at the insistence of petitioner, showed petitioner where the day's receipts were located and then, at petitioner's demand, attempted to open a safe contained in a vault. Although unable to open the safe, Carter was able to comply with petitioner's command to open a locked cabinet and to hand over to petitioner 600 serialized, postal money order blanks. Petitioner then demanded to know where the machine used to print the face amount of the money orders was located (this was a Friden print-punch money order machine). Carter was then taken from the vault and tied upon the floor by the second robber, who by that time had obtained a sack containing the registered mail and the day's receipts.

A125

The sack was thereupon cut open and its contents removed. The robbers then fled the scene (R. 48-50, 52-53,55).

An inspection of the premises after the victims were freed disclosed that in addition to the contents of the registered mail sack and the 600 postal money order blanks, the Friden print-punch machine, which was last seen in the hands of one of the robbers by both John Carter and Christianna Jones, and a .38 caliber pistol, last seen after closing hours in an open safe on the floor of the work area, were also missing (R. 55-56).

At trial all four postal employees, John Carter, John Conley, Reuben Carter and Christianna Jones, identified petitioner as the shot-gun wielding robber (R. 15a, 17, 42-42, 53-55, 79-80).

Also testifying for the Government was John Iachello, a New York City Police Officer. Officer Iachello testified as to his arrest of petitioner approximately two hours after the robbery and his recovery from petitioner's car of a quantity of mail identified as having been stolen in the robbery (R. 84-91).

Petitioner called two alibi witnesses, Lilly Haigler, his wife, and George Jennette. Haigler and

A126

Jennette both testified that they were with petitioner from between 5:30 and 6:00 P.M. on March 23, 1972. Jennette further testified that he and petitioner left Haigler shortly after 6:00 P.M. and that he remained with petitioner until about 6:50 P.M. (R. 132-135). Petitioner took the witness stand in his own behalf. He denied leaving Brooklyn on March 23, 1972 and denied robbing the Rochdale Village Postal Station. Petitioner's version of his activity on the day in question coincided with the testimony of Lilly Haigler and George Jennette (R. 145-148).

A127

ARGUMENT

POINT ONE

PETITIONER WAS PROPERLY SENTENCED IN ACCORDANCE WITH THE REQUIREMENTS OF RULE 32(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, AND HE IS ENTITLED TO NO RELIEF UNDER T. 28, U.S.C., §2255.

Petitoner claims that his sentencing violated Rule 32a of the Federal Rules of Criminal Procedure. He bases this claim on two arguments. The first is that he was not given an opportunity to speak in his own behalf at the time of sentencing. The second is that Judge Costantino and petitioner's attorney did not understand the sentencing options available to the Court under §2114. Both contentions are totally without merit.

Annexed hereto as Appendix B is a copy of the transcript of the proceedings at petitioner's sentencing on August 15, 1972. The transcript clearly shows that Judge Costantino addressed petitioner's counsel and stated to him:

> "...anything you say, you may say it, but your client has a right to say anything he wishes to."

(App. B, page 4).

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Although it may be contended that, in petitioner's case, the Court did not literally "address the defendant personally" and ask him if he wished to make a statement in his own behalf, Rule 32(a), F.R.Cr.P., it can hardly be said that petitioner was not afforded an opportunity to speak. On the contrary, the words of Judge Costantino are clear. Petitoner was present when the Court told his attorney that petitioner had a right to make any statement he wished.

As noted above, petitioner also claims that he is entitled to relief because his attorney and Judge Costantino did not understand the sentencing options available under §2114. The argument appears to be that because the Court allegedly thought the 25 year sentence was mandatory, petitioner was improperly sentenced and deprived of his opportunity for allocution. This contention is plainly frivolous. Petitioner's counsel was given an opportunity to speak but chose not to do so. In addition, as Judge Costantino made clear in his Memorandum and Order of March 26, 1975, the Court fully understood the options available to it under §2114 at

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the time petitioner was sentenced. See T. 18, U.S.C., §2114; Andrews v. United States, 373 U.S. 334, 340 (1963).

Moreover, even if the Court had not given petitioner an opportunity to speak, no claim for relief would exist under §2255. In Hill v. United States, 368 U.S. 424 (1962), the Supreme Court held that failure to follow the formal requirements of Rule 32(a) is not of itself an error that can be raised by collateral attack under §2255. Subsequently, in Machibroda v. United States, 368 U.S. 487 (1962), decided just one month after Hill, the Supreme Court was faced with the claim of a 2255 petitioner who had not been asked at the time of sentencing if he had any statements to make in his own behalf. In ruling on the Sixth Circuit's affirmance of a district court order denying Machibroda's petition for relief under §2255, the Court stated, at 368 U.S. 489:

> "For the reasons stated in Hill v. United States ante, p. 424, we hold that the failure of the District Court specifically to inquire at the time of sentencing whether the petitioner personally wished to make a statement in his own behalf is not of itself an error that can be raised by motion under 28 U.S.C., §2255 or Rule 35 of the Federal Rules of Criminal Procedure."

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Based on the foregoing analysis, we most respectfully submit that it is clear that (i) petitioner was afforded an opportunity to speak at the time he was sentenced and that (ii) even had he not been given such an opportunity, he would not be entitled to any relief under §2255. Accordingly, we must state that we are unable to understand the remand of the Court of Appeals for a hearing on petitioner's sentencing claim.

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POINT TWO

ANY ERROR IN THE COURT'S CHARGE WAS HARMLESS, AND PETITIONER IS ENTITLED TO NO RELIEF UNDER T. 28, U.S.C., §2255 AS A RESULT THEREOF.

As already indicated, the Court of Appeals has also remanded petititoner's case to the District Court for a hearing on what it calls petitioner's "jury charge" issue. This aspect of the remand is particularly puzzling, in view of the fact that petitioner has never asserted a claim with respect to Judge Costantino's charge. No objection was voiced to the charge at the time it was given; the issue was never raised on appeal; and petitioner has never asserted it in the 2255 proceedings in this case in the District Court and before the Court of Appeals. Indeed, the only reference in any of petitioner's papers to the Court's instructions to the jury appears in the context of petitioner's argument with respect to his sentencing. At page seven of his original 2255 petition in the District Court petitioner quoted a portion of the Court's charge:

> "Now, a dangerous weapon includes anything operated or wielded or otherwise used by one or more persons to inflict severe bodily harm or injury upon another person.

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So an operable firearm such as a pistol or gun capable of firing a bullet or ammunition may be found to be a dangerous weapon.

Now, to put in jeopardy, of course, goes without saying that by the use of that weapon you expose a person to fear of his life or to a risk of death.

Now, in this case, you may infer a gun used during a robbery was loaded, in the absence of direct proof that the chambers contained bullets."4/ (239)

In view of the fact that the foregoing excerpt constitutes the only reference in petitioner's papers to Judge Costantino's charge it must be assumed that the Court of Appeals was referring to this portion of the charge in its remand order. Accordingly, it is to this quoted excerpt that we have directed our attention in this memorandum.

Having considered this portion of the charge, we conclude that it was error for the Court to employ the phrase "expose a person to fear of his life," found in the third paragraph above. In the context of this case, however, the error was harmless. Petitioner is entitled

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4/ After quoting this portion of the Court's charge, petitioner specifically stated that he was citing "the above excerpt of the Court's charge not as a challenge of its sufficiency..." (See Petitioner's Motion for Re-Sentence dated March 3, 1975, page 7).

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to no relief as a result thereof under T. 28, U.S.C., §2255.

In United States v. Donovan, 242 F.2d 61 (2d Cir. 1957), reversed on other grounds, sub nom. Andrews v. United States, 373 U.S. 334 (1963), the Second Circuit was called upon to interpret the meaning of the word "jeopardy" appearing in T. 18, U.S.C., §2114. The question arose in the context of an appeal from a conviction after a trial, where the judge had charged the jury that the statutory phrase "puts his life in jeopardy" meant 'that the [postal employee] must have been put in fear of being killed or in danger of being killed.' id, 63. The Court of Appeals held that this instruction was incorrect, because it had enabled the jury to find the defendant guilty if it believed that the postal employee was put in fear of death, even though it also found that his life was not actually in danger. In support of its decision, the Court reasoned that the word "jeopardy" in §2114 means danger not fear. Accordingly, it was deemed improper for the trial judge, in his charge, to have used the phrase "in fear of being killed." Significantly, however, the Court declined to reverse the judgment of conviction. Writing for the Court, Judge Medina found that the error was harmless, in view of the fact that defense counsel had requested the erroneous instruction and that, on the record, there was "no doubt as to the actuality of the danger to the postal employee's life." id at 64.

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Similar results have been reached in cases involving T. 18, U.S.C., §2113(d), the federal bank robbery statute.[5/] Courts have held that it is error for a jury to be charged that it may find a defendant guilty under §2113(d) if it finds that the actions of the defendant created either fear or risk of death. There must be an actual risk of death; mere fear is not enough. See, for example, Morrow v. United States, 408 F.2d 1390 (8th Cir. 1969); United States v. Marshall, 427 F.2d 434 (2d Cir. 1970). However, in cases where the jury has before it facts sufficient to support a finding that lives actually were in jeopardy, such an instruction will be dismissed as mere harmless error. In United States v. Marshall, supra, where there was some evidence tending to show that guns used in the bank robbery were not loaded the Court stated:

> In light of the premissible inference that we have said may be used to find that the guns used during a robbery are loaded, we would be quick to find harmless error here if we were convinced that the jury would have found that the guns were loaded and accordingly, that lives had been "in jeopardy."

5/ Section 2113(d) provides, in relevant part:

> Whoever, in committing or in attempting to commit, any offense defined in subsections (a) and (b) of this section,... puts in jeopardy the life of any person by the use of a dangerous weapon or device..."

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427 F.2d at 438. See also United States v. Johnson, 401 F.2d 746 (2d Cir. 1968); United States v. Cady, 495 F.2d 742, 745-747 (8th Cir. 1974); United States v. Stewart, 513 F.2d 957, 960 (2d Cir. 1975).

The facts of petitioner's case are such that the incorrect charge given by the Court amounts to nothing more than harmless error. Petitioner and his accomplice were both armed and brandished their weapons throughout the robbery. There was no evidence introduced which could have created the slightest doubt that the guns were loaded. Cf. United States v. Marshall, supra. Based on the evidence, it was entirely proper for the jury to conclude beyond a reasonable doubt that the shotgun carried by petitioner during the robbery was loaded. Cf. Smith v. United States, 284 F.2d 789, 791-792 (5th Cir. 1960); United States v. Johnson, supra; United States v. Waters, 461 F.2d 248, 251-252 (10th Cir. 1972); United States v. Stewart, supra.

Finally, in Gates v. United States, 515 F.2d 73 (7th Cir. 1975), the Seventh Circuit determined that

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> Relief is available under §2255 only if the petitioner demonstrates that the error of the trial court is jurisdictional or constitutional, Hill v. United States, 368 U.S. 424, 428 (1962), or an error of law which is "a fundamental defect which inherently results in a complete miscarriage of justice" and which presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." [citing Davis v. United States, 417 U.S. 333, 346 (1974)].

515 F.2d 76-77.

Petitioner is clearly entitled to no relief under §2255 on account of harmless error committed in the Court's charge to the jury.[6/]

6/ We also add, in order to complete our argument in this case, that any error with respect to the charge which is now, so it appears, being attacked collaterally must be viewed as altogether diluted by the passage of time. Thus, as noted above, the error was never noticed by trial counsel at the time the charge was given; it was never noticed throughout the appellate process; and, indeed, it was never noticed by petitioner himself. Under all these circumstances, even if the issue is otherwise meritorious, we believe that the claim is not cognizable under §2255. See United States v. Sobell, 314 F.2d 314, 323 (2d Cir.), cert. denied, 374 U.S. 857 (1963); United States v. Travers, 514 F.2d 1171, 1176-1177 (2d Cir. 1974).

Moreover, we are unable to understand what kind of hearing the Court of Appeals envisioned with respect to petitioner's "jury charge" issue. A reading of the trial transcript, to gain an understanding of the evidence before the jury, is all that is required in order to determine whether or not the Court's instructions were correct.

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CONCLUSION

Petitioner's motion should in all respects be denied.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Alvin A. Schall
Assistant U.S. Attorney
(Of Counsel)

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

72 CR 393

HEYWARD MARTIN,

Defendant.

----------X

United States Courthouse,
225 Cadman Plaza East,
Brooklyn, New York

August 15, 1972,
11 o'clock, a.m.

B E F O R E :

HON. MARK A CONSTANTINO,

U. S. D. J.

I HEREBY CERTIFY THAT THE WITHIN COPY IS A TRUE AND ACCURATE TRANSCRIPT OF MY STENOGRAPHIC NOTES TAKEN AT SUCH PROCEEDING.

Leo Rashkin
OFFICIAL COURT REPORTER

LEO RASHKIN

ACTING OFFICIAL COURT REPORTER

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APPEARANCES:

ROBERT A. MORSE, ESQ.,
UNITED STATES ATTORNEY FOR THE EASTERN
DISTRICT OF NEW YORK,

BY: JOAN O'BRIEN, ESQ., of Counsel.

JOHN C. CORBETT, ESQ.,
ATTORNEY FOR DEFENDANT.

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P R O C E E D I N G S:

THE CLERK: For sentencing Heyward Martin.

MR. CORBETT: I don't know whether Your Honor recalls but, at the trial, I reserved motions with respect to the verdict of the jury until today.

I move to set aside the verdict on the ground it is not established by the weight of the credible evidence.

THE COURT: Denied.

MR. CORBETT: I have a second motion, Judge.

When the jury returned its verdict, I requested it be polled. I am sure, Your Honor, recalls I had a problem with Juror No. 5. The record will show that when questioned as to her verdict, she showed a great deal of indecision, looked around, and you proceeded to prompt her to tell her verdict.

The lady became more confused and, as a matter of fact, simultaneously with my request to you, you also requested the jury stop prompting her, and tell her verdict.

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PRELIMINARY STATEMENT

Petitioner is presently incarcerated in the Federal Penitentiary in Atlanta, Georgia, serving a 25 year sentence, following his conviction in the United States District Court for the Eastern District of New York (Costantino, J.), on August 15, 1972, of armed robbery of a post office, in violation of T. 18, U.S.C., §2114. Petitioner was also convicted of unlawful possession of stolen mail, in violation of Title 18, United States Code, §1708. For this offense, he was given a five year sentence, to run concurrently with the sentence imposed by Judge Costantino under §2114. Petitioner's conviction was affirmed by the United States Court of Appeals for the Second Circuit, without opinion, on March 15, 1973.

In March of 1975, petitioner moved pro se in the District Court, pursuant to T, 28, U.S.C., §2255, for an order to correct his sentence. In support of his motion, petitioner alleged that he had been denied an opportunity to speak in his own behalf at the time of sentencing. See Rule 32(a) of the Federal Rules of Criminal Procedure. Petitioner also appeared to claim that he had been improperly sentenced because Judge Costanting and petitioner's counsel allegedly failed to understand that when sentencing petitioner under §2114 the Court had the option of placing petitioner on probation. In a Memorandum and Order filed March 26, 1975 Judge Costantino denied petitioner's motion, pointing out that petitioner had in fact

been given an opportunity to speak in his own behalf at sentencing and noting that the Court had understood the sentencing requirements and options under T. 18, U.S.C., §2114.

Following the denial of his motion, petitioner submitted a pro se motion for reconsideration in the District Court, again alleging the same two grounds upon which he had relied in his original petition. This motion was denied by Judge Costantino in a Memorandum and Order filed April 24, 1975.

After the denial by Judge Costantino of his motion for reconsideration, petitioner appealed pro se to the Court of Appeals, asking for leave to proceed in forma pauperis and for the appointment of counsel. In his appeal, petitioner relied upon the same claims which he had asserted in the District Court.

On September 3, 1975, the Court of Appeals ordered that petitioner's case be remanded to the District Court "for a hearing on appellant's sentencing and jury charge issues." At the same time, petitioner's motion for leave to proceed in forma pauperis and for the appointment of counsel was denied as moot.

The order of the Court of Appeals was unaccompanied by any opinion.

This petition is submitted on behalf of petitioner for a hearing upon the remand of petitioner's case by the Court of Appeals. Counsel has been assigned by the court and was not counsel at the original trial.

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THE COURT'S CHARGE TO THE JURY CONTAINED PLAIN ERROR AND PETITIONER IS ENTITLED TO RELIEF UNDER 28 U.S.C. §2255 AS A RESULT THEREOF

18 U.S.C. §2114 states a greater crime and a lesser crime, and the lesser crime by definition is a lesser-included offense of the greater crime. By the facts of this case, the petitioner was entitled to have the jury receive a charge concerning this lesser-included offense.

18 U.S.C. §2114 states:

"§2114. Mail, money or other property of United States

> Whoever assaults any person having lawful charge control, or custody of any mail matter or of any money or other property of the United States with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

The National Commission on Reform of Federal Criminal Laws defined a lesser-included offense as one which is established by proof of the same or less than all the facts required to establish the commission of the offense charged. U.S. v. Whitaker 447 F.2d 314(1971, D.C. Cir.),

Another definition was stated by the 8th Circuit Court of Appeals in U.S. v. Beneke, 449 F.2d 1259(1971) when it stated

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at page 1262:

> "'To be necessarily included in the greater offense, the lesser must be such that it is impossible to commit the greater without first having committed the lesser. James v. United States, 9 Cir., 16 Alaska 513, 238 F.2d 681, 683. Stated differently, the offense must not require some additional element not needed to constitute the greater offense. Waker v. United States, 1 Cir., 344 F.2d 795, 798.' Olais-Castro v. United States, 416 F.2d 1155, 1157 (9th Cir. 1969). Accord, Theriault v. United States, 434 F.2d 212, 214 (5th Cir. 1970): Larson v. United States, 269 F.2d 80, 81 (10th Cir. 1961)."

By the very language of 18 U.S.C. §2114, the first offense stated is a lesser-included offense of the greater offense. The language states that the greater offense only occurs in instances of effecting the lesser offense. However, the case of Brooks v. United States, 223 F.2d 393 (1955, 10th Cir.) makes it clear that this statute states only one crime with two parts. By the holding of Brooks v. United States, supra, a person cannot be convicted and sentenced under both phrases of the statute for the same incident and this principle is also consistent with the definition of a lesser-included offense.

The charge in question was in error because the defendant was entitled to a charge upon the lesser included offense as of right. Rule 31 (c) of the Federal Rules of Criminal Procedure states:

> "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

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In Sansone v. United States, 380 U.S. 343, 13 L.Ed.2d 882, 85 S.Ct.1004 (1965), the Supreme Court, after quoting this rule, stated:

> "Thus, '(i)n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie(s) it...(is) entitled to an instruction which would permit a finding of guilt of the lesser offense.' Berra v. United States, supra, 351 US at 134, 100 L ed at 1017. See Stevenson v. United States, 162 US 313, 40 L ed 980, 16 S Ct 839. But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. Berra v. United States, supra; Sparf v. United States, 156 US 51, 63-64, 39 L ed 343, 347, 348, 15 S Ct 273. In other words, the lesser offense msut be included within but not on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. Berra v. United States, supra: Sparf v. United States, supra, 156 US at 63-64, 39 L ed at 347, 348."

In 18 U.S.C. §2114 conviction upon the greater offense requires a finding by the trier of fact that the person having custody of the mail was wounded or that his life was put in jeopardy by use of a dangerous weapon. A conviction for the lesser offense does not require a finding of these facts. In the case at bar, the petitioner has raised the factual issue of whether the postal workers' lives were placed in jeopardy. Therefore, this case presents an issue where "the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense," Sansone v. United States, supra.

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In the case at hand, there is a genuine conflict of evidence as to whether the postal employees lives were put in jeopardy, as shown by the petition in forma pauperis of petition at page 9. Although the jury did find the defendant guilty of the greater offense, which by definition makes him guilty of the lesser offense, if given the opportunity, they might have only found the petitioner guilty of the lesser offense. The Supreme Court expressed this same idea when it stated:

> "Moreover it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction--in this context or any other--precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. (emphasis by the court)"
>
> Keeble v. United States, 412 U.S.205, 212, 213 (1973), 93 S Ct 1993, 1997, 1998, 36 L ed 2d 884.

It is the contention of petitioner that this result may have occurred in the case at bar. While the evidence was overwhelming that petitioner did commit some crime, there was a reasonable doubt as to whether he committed the crime for which he was convicted. However, the jury, being unaware

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of the severe penalty to be imposed, convicted petitioner of the only crime charged by the court.

It has been held by the 6th Circuit Court of Appeals that the Court of Appeals could not consider a claim of error in the court's charge unless there was an objection to the charge by the defendant's counsel or unless the charge was so prejudiced as to lead to a miscarriage of justice. United States v. Foster, 407 F.2d 1335(1969) cert. den. 396 U.S. 862, U.S. v. Vigi, 515 F.2d 290 (1975).

In the case at bar, petitioner respectfully submits that the court's charge was so prejudicial as to lead to a miscarriage of justice, especially when viewed in light of the quoted portion of Keeble v. U.S., supra, and that upon review, the charge may properly be found to be in error even though petitioner's counsel did not request it nor object to the charge given. The actual facts show that petitioner was convicted of a crime for which a mandatory twenty-five (25) year sentence was imposed. Had the correct charge been given, the defendant could have received a maximum term of incarceration of ten (10) years, and he might have received a term of probation only or a small term of incarceration, rather than the mandatory twenty-five (25) years. Petitioner contends that because of the great disparity in prison terms imposed under the different sections of 18 U.S.C. §2114, the failure to charge the lesser-included offense to the jury was "so prejudicial as to lead to a miscarriage of justice" in this case and permits the court to review the

sentence on its own.

Upon the review. it is respectfully submitted that the charge given will be found to contain plain error under Rule 52(b) of the Federal Rules of Criminal Procedure, and under 28 U.S.C. §2255, the court should either vacate the sentence of imprisonment or set aside the judgment rendered and grant a new trial.

CONCLUSION

Petitioner's sentence should be vacated and the judgment should be set aside and a new trial granted.

Respectfully submitted,

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Assigned Counsel
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Brooklyn, New York 11242
(212) 855-9252

HAROLD I. GUBERMAN
(of counsel)

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- :

HEYWARD MARTIN, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

April 13, 1976

B e f o r e :

HONORABLE MARK A. COSTANTINO, U.S.D.J.

MICHAEL MIELE
OFFICIAL COURT REPORTER

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Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: ANTHONY A. SCHALL, ESQ.
Assistant U.S. Attorney

IRA COOPER, ESQ.
Attorney for Defendant

JOHN CORBETT, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

MR. SCHALL: Before Mr. Corbett testifies, may we have a copy of the sentencing minutes?

MR. COOPER: No objection.

THE CLERK: Transcript marked Government's Exhibit 1.

(So marked)

DIRECT EXAMINATION:

BY MR. SCHALL:

Q You are an attorney practicing in Brooklyn?

A Yes.

Q For how long have you been practicing criminal law?

A Admitted to the Bar 1941, a member of the Bar 35 years, practicing criminal law since March 1946.

Q How many criminal cases would you estimate that you have tried?

MR. COOPER: I concede Mr. Corbett is an expert.

THE COURT: I concede it, too.

Q I ask if you recognize the defendant, Heyward Martin?

A Yes.

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MR. COOPER: Indicating the defendant.

Q Directing your attention to March of '72, did there come a time during that month when you had occasion to be assigned to represent Mr. Martin?

A I don't know if it was March or April.

Q Were you advised at that time, did you learn at that time that Mr. Martin was charged with armed robbery of a post office?

A Yes.

Q Did there come a time when you discussed with Mr. Martin the criminal penalties which he faced if convicted under the statute with which he was charged?

A The thing I was interested in first, Mr. Martin told me he was innocent then I believe that I told him this was a serious charge and that the substantive statute carried a 25 year penalty.

Q When was the first time you advised him of this.

A It's hard for me to remember. I would think because he was arrested some time in April, I believe, or late March and was indicted during the month of April -- in the interim I had a conversation with Paul Lazarus and also with O'Neil, the postal inspector, who was most anxious for Mr. Martin's cooperation.

THE COURT: Sustained.

Q When was it, to the best of your recollection, when did you advise Mr. Martin of the penalties he faced, as best as you can recall ?

A I think it would be probably the first or second conversation I had with him.

Q No later than the end of April 1972?

A Yes.

Q Did there come a time when you discussed with Mr. Martin a proposed disposition in this case?

MR. COOPER: Objection.

THE COURT: That's not relevant. He went to trial and was convicted.

MR. SCHALL: My only intention in mentioning it is to illustrate the fact there was between Martin and Corbett communication discussions of the charges.

THE COURT: I don't think that is right whether or not he responded to a penalty situation.

MR. SCHALL: May I just establish if there was a discussion on penalty situations?

THE COURT: Yes.

BY MR. SCHALL:

Q Did there come a time when you and Mr. Martin discussed a dispostion in this case offered by the

United States Attorney's Office?

A I couldn't place a date on it.

Q Were there such discussions?

A We did talk about it. Any disposition depended on his cooperation with Postal Inspector O'Neil.

Q There were discussions as to a disposition between you and Mr. Martin?

A Yes.

Q Finally did you handle the trial of Mr. Martin's case?

A Yes, before Judge Costantino.

Q Did there come a time when you were present at Mr. Martin's sentencing?

A Yes.

Q How would you describe Mr. Martin in terms of appearance and action on the day of sentencing?

A The same as he did during the trial, perfectly normal and understood what was going on.

Q Did he appear to be --

THE COURT: No issue as to that. The only issue here is whether or not at the time of sentence he understood that he had a right to talk and whether or not he understood he could ask for, give the Court any mitigating circumstances.

A/55

Q At the time Mr. Martin appeared before Judge Costantino for sentencing, were you aware at that time of the options and requirements that the Judge had before him at the time of sentencing?

A Yes.

Q What were those options and requirements?

A As I read the statute, it read that in the event of conviction that the defendant shall be sentenced it is mandatory to be sentenced to a period of 25 years. However that must be read in connection with one of the other sections where any federal case a Judge can give a probation or suspended sentence.

Q You understood he could either get 25 years or probation or suspended sentence?

A The only choices the Judge had, imprisonment, 25 years otherwise probation or suspended sentence.

Q You understood this at the time of sentencing?

A Yes.

Q Was Mr. Martin given an opportunity to speak, by Judge Costantino?

MR. COOPER: Objection.

Q What, if anything, -- do you recall whether or not Judge Costantino addressed you at the time of sentencing?

A I believe the Judge said, "I will be glad to listen to anything you have to say," and something like, "anything your client has to say". He said, "I will allow to anything you have to say".

MR. SCHALL: I will let the record stand on what was said at that time.

MR. SCHALL: That's all I have.

THE COURT: At the time the Court stated to you, your client had a right to speak, did you turn to your client and make a statement to him at that time in the Court's presence?

THE WITNESS: I am trying to recall. I think I asked him, "Do you have anything to say?"

THE COURT: In the Court's presence? Although it was not placed on the record?

THE WITNESS: Yes.

THE COURT: Did your client turn to you and say something to you in the Court's presence although not placed on the record, sort of a conversation betwen attorney and client?

THE WITNESS: He either said, "No, I have nothing to say --"

THE COURT: What did you respond to the Court?

THE WITNESS: I am trying to think, I know

I said something.

THE COURT: If the Court advises you that the record says the following:

"The Court: You understand the sentence is mandatory so that anything you say you may say it but your client has a right to say anything he wishes, too."

Was your client standing approximate to you?

THE WITNESS: Standing side by side in front of you.

THE COURT: Did your client at that time turn to you and say something to you in reference to talking? Do you recall asking him whether he wanted to say anything?

THE WITNESS: I recall asking him and I believe his answer was no.

THE COURT: Your response was, "I have one thing to say; I have filed notice of an appeal and under those circumstances, would your Honor consider putting this defendant on bail pending appeal," and the Court said, no?

THE WITNESS: Yes.

THE COURT: You said, "In view of the fact this is a mandatory sentence then the defendant is

ready"?

THE WITNESS: Yes.

THE COURT: Was there any time during that sentencing procedure before the Court, that your client said anything to you that he wished to talk to the Court?

THE WITNESS: No, sir.

THE COURT: That's all.

CROSS-EXAMINATION

BY MR. COOPER:

Q Do you recall the first place or under what circumstances you first met Mr. Martin?

A I believe in the Magistrate's courtroom.

Q Did you discuss with him the penalties at that time?

A No, sir.

Q Did there come a time that you discussed with Mr. Martin the penalties involved in the conviction that he was charged with?

A Yes.

Q When for the first time did that take place?

A It's difficult to fix the exact time.

Q Under what circumstances?

A After we had a lineup in the Marshal's office.

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I recall I was on trial before Judge Weinstein and called down to the lineup of four witnesses present in the post office when this stickup took place. It may have been a --

Q Where did you speak to him,in the office of Mr. Lazarus?

A I don't believe so. It may have been in West Street.

Q What did you tell him the penalties were?

A Mandatory penalty 25 year period.

Q Did there come a time you spoke -- Mr. Lazarus spoke to the defendant in your presence?

A No, I -- Lazarus was most careful, if he spoke to him I would have been there.

Q Do you recall it?

A No.

Q There came a time you tried the case and the jury rendered a verdict?

A Yes.

Q Did you discuss the penalty at that time with Mr. Martin?

A No, not after the verdict.

Q Prior to the time the verdict came in?

A Yes, one day during the trial we had discussed

it. I said this carries a 25 year penalty and the next day he came back and said to me, he discussed the matter with Lenny Borell, I asked him did he mean Lowell Borell, a rather well known individual and he said, yes. I said I represented him once in Supreme Court County and Lowell Borell said I was absolutely wrong on it.

Q Did you discuss the penalties with him on the day of sentence?

A I haven't talked to Borell in years. I am trying to think, I can't be certain. I may have.

(Continued on next page.)

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THE COURT: Where are we?

MR. SCHALL: We are all set to proceed. As your Honor knows the Government's position in the matter is that the only issue now is the question of sentencing. As your Honor knows our position is that even if the Court had not given Mr. Martin an opportunity to speak, which the Court did do, clearly under the Supreme Court holding under Machibroda, he has no relief under Section 2255.

The Court stated last time we were here, notwithstanding the holding of that case, that since the Court of Appeals had requested -- ordered a hearing on the sentencing issue that there be one. I am confident --

THE COURT: That is what disturbs me. Why would they send it back to have a hearing if they didn't feel the law is not that concrete in the area.

MR. SCHALL: I think quite frankly as I think we indicated in our memorandum of law that we couldn't understand the reasoning of the Court of Appeals either.

We are prepared to proceed and -- with Mr. Corbett as a witness.

THE COURT: I am certain that the Court of Appeals feels that there should be a direct request to the defendant and here they say by asking the lawyer if the client has anything to say was not a direct statement to the defendant. I can't tell you how I know, but I can tell you that was the reason for it. I was disturbed when I first received that order. I made a call why an order of that type would be sent back. In no uncertain terms, they didn't think it was unfrivolous.

It was sent back for the purpose that he did understand that he had a right to talk. That's all I can tell you. They don't send things back unless they have something in their mind. I am around here long enough to know that when they do something, it's with a purpose.

MR. PATTISON: May I suggest if I might.

THE COURT: Yes.

MR. PATTISON: Possibly what we might do, take whatever evidence we can now and then possibly something could be worked out thereafter at a later date concerning possibly another sentence, r resentencing, or whatever but as long as we have a witness now take that. Get that on the record and then we will see what happens later on.

THE COURT: I reserve decision.

BY MR. COOPER:

Q Now, the date of sentence, you don't recall whether or not you spoke to him before the time of sentence concerning --

A I spoke to him but I don't recall whether I spoke to him as early --

Q You understood on the date of sentence, did you not, that your understanding on the date of sentence, that the sentence of 25 years was absolutely mandatory?

A Mandatory unless the Judge was going to give him probation or a suspended sentence.

Q Did you ask for that?

A No. I did not ask for that.

Q Did you know it was available?

A I thought it was theoretically available but I didn't want to insult the intelligence of the Court by asking for a probation or a suspended sentence in view of a conviction after trial for an armed robbery of a

(Continued on next page.)

post office.

Q I ask you to look at the minutes on Page 5. You stated to the Court, did you not, Mr. Corbett, in view of the fact this is mandatory sentence, the defendant is ready?

A Yes.

Q You took it that the mandatory sentence was 25 years?

A Let me explain this to you, Mr. Cooper. I have represented many defendants. I would not -- in view of the facts that were brought out during the trial, in view of the fact that Mr. Martin had a criminal record, at any time did I believe by any stretch of imagination that any Judge was going to give him probation or a suspended sentence. I knew a Judge was going to give him time and subsequently if he got time at all, it had to be 25 years.

Q Did you ever, Mr. Corbett, tell Mr. Martin that in the event he was -- this problem prior to the time of the verdict -- that in the event he would be convicted of the violation that he was charged with, that he would have an opportunity or there might be a chance, no matter how slim, that the Court might sentence him to probation or a suspended sentence. I never believed that he would get probation or a suspended sentence if convicted and I

never advised him of that.

Q Did you ever advise him that -- on the date of sentence as to that?

A No.

MR. COOPER: I have no further questions, your Honor.

MR. SCHALL: I have some redirect, your Honor -- I have no redirect, your Honor.

THE COURT: All right.

Step down.

Did you say he wants to take the witness stand?

MR. COOPER: That's what I am discussing now.

THE COURT: All right.

(Pause)

MR. COOPER: If your Honor pleases, after having a conference with the defendant --

THE COURT: For the record, the conference was held in open court before the Judge, although out of earshot of the court.

MR. COOPER: The defendant does not desire to take the stand. Basically anything that he would testify to --

THE COURT: I don't want to know basically. He does not want to take the stand?

MR. COOPER: Correct.

MR. SCHALL: The Government rests.

THE COURT: The defendant rests?

MR. COOPER: Yes.

May I make a statement for the record?

THE COURT: Yes.

MR. COOPER: Although, your Honor, as a defense attorney myself, who appears before some of the same Judges on many occasions, I can understand Mr. Corbett's feelings that there was no chance in his mind and -- in Mr. Corbett's mind for this defendant to receive probation. I think the crucial part that no one told Mr. Martin that there was an opportunity for probation or a suspended sentence. It could very well be, your Honor, I am just speaking this out.

THE COURT: I am not getting angry because you are arguing for your client.

MR. COOPER: It could very well be and probably would have happened if someone would have informed Mr. Martin that there was an opportunity, no matter how slim, no matter how remote for him

to receive probation, or for him to receive a suspended sentence, he may have, No. 1, obtained also from people, recommending him for such a sentence, play upon the Court's sympathy, maybe have someone here on the date of sentence, maybe he would say something in his behalf or maybe he requests Mr. Corbett to say something on his behalf.

I say because he was unaware of that and because he was not advised that the sentence he was given was illegal. The man did not understand that he had a right to that and because of that he remained silent on the date of sentence and no one did speak up on his own behalf.

THE COURT: Your argument -- it is not a question whether or not he was advised of a right to talk, you understand that, but a question whether he knew that he could ask for probation at the time?

MR. COOPER: Correct.

THE COURT: But he was advised -- the information shows that he was advised that he had a right to speak to the Court?

MR. COOPER: That's correct --

THE COURT: If he doesn't want to take the stand I don't want to place him in any position

that is untenable for him.

MR. COOPER: That's correct, there is no contention -- furthermore there is no allegation or contention that the Court, at the time of sentence, that the defendant, Mr. Martin, was not aware that he could speak if he wanted to. However, because he was not aware of anything positive to him but 25 years incarceration, he didn't say anything. He was glad he was standing on his feet and not fainting.

THE COURT: That's a true statement, the last part of it.

I will reserve decision.

MR. SCHALL: I might state for the record, the Government's position is that one, Mr. Martin, was given an opportunity to speak clearly. Both the Court and Mr. Corbett understood the options and requirements available under the statute and that again as we reiterated, even if he had not been given an opportunity to speak as the cases clearly and specifically show, no relief is available under 2255.

THE COURT: They still sent it back to me. You keep telling me that. The Court of Appeals did send it back to me under a 2255 and I'd hate

to say, yes, you're in error.

MR. COOPER: He is going -- remain here until the decision is handed down?

THE COURT: Yes.

MR. COOPER: Is there a way you do put an order in that he remain here?

THE COURT: Yes.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HEYWARD MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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75-C-365

MEMORANDUM and ORDER

JUN 1 1976

COSTANTINO, D.J.

Petitioner, Heyward Martin, was convicted on August 15, 1972 of armed robbery of a post office in violation of Title 18 U.S.C. § 2114 and unlawful possession of stolen mail in violation of Title 18 U.S.C. § 1708 and § 2. He was sentenced to a 25 year term of imprisonment for the former offense. For the latter offense he was sentenced to a five year term of imprisonment to run concurrently with the sentence imposed for violation of § 2114. The conviction was affirmed by the Court of Appeals on March 15, 1973.

Martin's motion pursuant to 28 U.S.C. § 2255 for an order to correct his sentence was denied by this court in a Memorandum and Order dated March 20, 1975. His motion

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for reconsideration was subsequently denied in a Memorandum and Order dated April 24, 1975.

On September 3, 1975 the Court of Appeals remanded Martin's case to this court "for a hearing on appellant's sentencing and jury charge issues." Pursuant to this mandate, the court held a hearing. Present at the hearing were John Corbett, Esq., an attorney who represented Martin at trial and at the latter's sentencing; Ira Cooper, Esq., an attorney who was appointed by the court to represent Martin at the § 2255 hearing; Alvin Schall, an Assistant United States Attorney; and Martin. Martin was allowed at the § 2255 hearing to bring to the court's attention whatever relevant evidence he wished. At the court's request, each side submitted briefs on the issues referred to in the Court of Appeals mandate.

This court has reviewed with great care the entire record, including the transcripts of Martin's trial, sentencing, and § 2255 hearing. The court has also reviewed the petitions submitted by Martin and the briefs prepared by opposing counsel.

The first question raised is whether Martin's

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sentence should be vacated because the court failed to address him directly when inquiring whether he wished to make a statement on his own behalf prior to sentencing. Prior to imposing sentence, this court stated to defense counsel in Martin's presence that defense counsel could speak on his client's behalf and that "your client has a right to say anything he wishes to." (Sentencing Record at 4). The best recollection of Martin's trial counsel, Mr. Corbett, is that in response to the court's prompting Corbett stated to Martin off the record "Do you have anything to say?" (§ 2255 Hearing Record at 8). Martin responded to Corbett's question by advising Corbett that he had nothing to say on his own behalf prior to sentencing (§ 2255 Hearing Record at 8-10).

Notwithstanding the foregoing, the failure of the court to address Martin directly was contrary to one of the requirements of Rule 32(a). The latter states that the court should "address the defendant directly."

In Hill v. United States, 368 U.S. 424, 428 (1962) and Machibroda v. United States, 368 U.S. 487, 489 (1962), it was held that the failure of a trial court to ask a

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defendant represented by counsel whether the defendant has anything to say on his own behalf was not an error of the character or magnitude cognizable under a writ of habeas corpus, see also United States v. Gardner, 480 F.2d 929, 932 (10th Cir. 1973)(dictum), cert. denied, 414 U.S. 977 (1973). In Hill, the Court noted that the failure to address a defendant personally "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure," 368 U.S. at 428. In the case at bar, it is clear that petitioner was afforded an opportunity to speak on his own behalf. In addition, there is no claim here that petitioner wished to make a statement at the time of sentencing but was prevented from doing so by the failure of the court to address him directly. Indeed, Mr. Corbett's undisputed testimony at the § 2255 hearing was that Martin rejected his counsel's express invitation to address the court personally prior to sentencing (§ 2255 Hearing Record at 8-10, 17-18). Martin has not, therefore, demonstrated that the court's failure to address him directly resulted in a "complete miscarriage of justice." Hill, 368 U.S. at 428. Nor has he shown that the omission was "inconsistent with

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the rudimentary demands of fair procedure." Hill, 368 U.S. at 428. All that is shown is a mere technical failure to comply with a requirement of Rule 32; such a showing is insufficient to make collateral relief available. Hill, 368 U.S. at 429.

Martin also contends that the sentence which was imposed for violating 18 U.S.C. § 2114 should be vacated because the court was not aware that it had the options of sentencing Martin to probation or suspending execution of the term of imprisonment.

This claim is based upon the court's statement prior to sentencing that the "sentence is absolutely mandatory." The seriousness of one of the charges on which Mr. Martin was convicted, armed robbery of a post office, led this court to conclude at the time of sentencing that a term of imprisonment must be imposed. This conclusion was reinforced by the fact that Martin had a prior criminal record. The phrase "absolutely mandatory" used by the court referred to the fact that under 18 U.S.C. § 2114 if a term of imprisonment is to be imposed, the court is required to impose a term of twenty-five years. This court certainly was aware,

100 days traffic viol.

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however, that it had the options of suspending execution of the term of imprisonment or placing Martin on probation. There is no merit to Martin's claim that his motion must be granted because the court was unaware of these options.

Martin contends in his petition that the § 2255 application should be granted because the attorney who represented him at the sentencing, John Corbett, Esq., may not have been aware at the time of sentencing that the court had the options of suspending execution of the term of imprisonment or putting Martin on probation. At the § 2255 hearing, Mr. Corbett stated that he was aware of these options but "didn't want to insult the intelligence of the court by asking for a probation or a suspended sentence in view of a conviction after trial for an armed robbery of a post office." Mr. Martin's claim that he is entitled to be released under § 2255 because of lack of knowledge on the part of Mr. Corbett is, therefore, clearly without merit.

The most serious question raised by petitioner is whether the motion must be granted because of an error in the court's charge to the jury. In its instructions

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regarding the alleged violation of title 18 U.S.C. § 2114, the court incorrectly charged that "to put in jeopardy [means] that by the use of the weapon you expose a person to fear of his life or to a risk of death." In United States v. Donovan, 242 F.2d 61, 63 (2d Cir. 1957), reversed on other grounds, sub. nom., Andrews v. United States, 373 U.S. 334 (1963), the Court of Appeals held that placing the life of a postal employee "in jeopardy" meant placing the employee in danger of death rather than putting him in fear of being killed.

objective test

The critical question with respect to the jury charge issue is whether the incorrect jury instruction noted above was harmless error. In Donovan, the Court of Appeals held that an instruction which was virtually the same as the one given here was harmless error. This finding rested in part on the concluison of the Court of Appeals that there appeared to be no doubt "of the actuality of the danger to the postal employee's life." Donovan, 242 F.2d at 64. In the case at bar, there can be no doubt that the postal employees' lives were actually in danger; for example, a postal employee, John Carter, testified that a man whom Carter identified as Martin (Trial Record at 15) "opened

not so: charge as given in Donovan was requested by D's counsel

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the door and at that time . . . came through and pushed a shotgun in our faces" (Trial Record at 14).

The conclusion reached in Donovan - that an error in defining "in jeopardy" could be harmless under appropriate circumstances - was reinforced in dictum in United States v. Marshall, 427 F.2d 434 (2d Cir. 1970). The latter case involved the federal bank robbery statute, 18 U.S.C. § 2113. The trial court in Marshall stated that "to put in jeopardy . . . means to expose [a] person to the risk or fear of death or injury by the use [of a dangerous weapon]." 427 F.2d at 434. The Court of Appeals stated that "in light of the permissible inference that we have said may be used to find that the guns used during a robbery are loaded, we would be quick to find harmless error here if we were convinced that the jury would have found that the guns were loaded and accordingly, that lives had been 'in jeopardy'" 427 F.2d at 438. In Marshall, the court did not find the instructions to be harmless error because there was "at least some evidence" tending to show that the guns used in the robbery were unloaded. In Marshall, the court concluded that since there was such evidence, it could not say beyond a reasonable doubt that the jury would have found a violation of the statute on

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a jury charge which properly defined the meaning of "in jeopardy." In the case at bar, there was no evidence produced at trial which tended to show that the weapons used in the robbery were unloaded. In addition, the jury rejected Martin's only defense - that he was not present at the scene of the robbery at the time of the robbery. In view of this and the permissible inference which may be drawn that a gun used in a robbery is loaded (United States v. Marshall, 427 F.2d at 438), this court is convinced beyond a reasonable doubt that if a correct definition of "in jeopardy" had been given the jury would have found that the guns used in the robbery were loaded and, accordingly, that the lives of the postal employees were placed "in jeopardy." Marshall, 427 F.2d at 438. Accordingly, the court is convinced beyond a reasonable doubt on the basis of the record before it that Martin would have been found guilty of violating § 2114 if a proper definition of "in jeopardy" had been given to the jury. This finding satisfies the Marshall test for harmless error. Buttressing the conclusion that any error was harmless is the fact that the evidence incriminating Martin was very strong; for example, four postal employees identified Martin at a lineup and in

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the courtroom at trial as having been one of the perpetrators of the robbery (Trial Record at 15A, 17, 42; 43, 53-55, 79-80).

Petitioner's counsel contends that the relief sought pursuant to 28 U.S.C. § 2255 must be granted because the court did not instruct the jury that it could find Martin guilty of a lesser included offense under 18 U.S.C. § 2114. The court offered to instruct the jury as to the lesser included offense but Martin's trial counsel specifically rejected the offer (Trial Record at 184). Martin elected not to risk conviction on the lesser offense. The failure to charge the lesser included offense was the result of trial counsel's strategy rather than error on the part of the court. United States v. Meyers, 443 F.2d 913 (9th Cir. 1971). Martin was not deprived of a fair trial by the failure to charge the lesser offense and such failure does not provide a basis under the circumstances present in this case for relief pursuant to 28 U.S.C. § 2255. In view of the foregoing, the application for relief pursuant to 28 U.S.C. § 2255 must be denied. So ordered.

U. S. D. J.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HEYWARD MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

NOTICE OF APPEAL

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S I R S:

PLEASE TAKE NOTICE, that the petitioner, Heyward Martin, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from Memorandum and Order dated June 1, 1976, and entered June 2, 1976 by HON. Mark C. Costantino denying petitioner's motion under title 28 U.S.C. 2255 for an order to correct his sentence, and from each and every part thereof.

Heyward Martin is currently incarcerated at the Metropolitan Correctional Facility located at Foley Square in the City and State of New York. He proceeded in forma pauperis in the District Court and cannot afford counsel for appeal.

The undersigned attorney was appointed to represent petitioner in this matter and has not been appointed to represent petitioner upon appeal. This notice is being filed to protect the rights of the petitioner, Heyward Martin.

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Petitioner is currently serving a 25 year sentence. Said sentence commenced on August 15, 1972.

DATED: Brooklyn, New York
June 4, 1976

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